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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-677

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, et al.,
Petitioners,

vs.

DEBORAH A. NORTHCROSS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE JUDGES OF THE SUPREME COURT OF THE UNITED STATES

Come the petitioners, the Board of Education of the Memphis City Schools and the members and superintendent of said Board, and file this, their petition for Writ of Certiorari, and in support of said petition, respectfully show to the Court:

I. REFERENCE TO LOWER COURTS' DECISIONS

The lower courts' decisions involving the present phase of the instant litigation are as follows:

Decision of the District Court for the Western District of Tennessee, Western Division, filed May 1, 1970, and reported at 312 F. Supp. 1150.

Remand of the United States Court of Appeals for the Sixth Circuit, filed June 7, 1971, and reported at 444 F. 2d 1179.

Decisions of the District Court for the Western District of Tennessee, Western Division, filed December 10, 1971; and April 20, 1972, and reproduced in the appendix to this petition.

Decision of the United States Court of Appeals for the Sixth Circuit filed August 29, 1972, and reproduced in the appendix to this petition.

II. JURISDICTIONAL STATEMENT

The petitioners in this cause seek a review of the August 29, 1972, decision of the United States Court of Appeals for the Sixth Circuit, styled *Deborah A. Northcross, et al., Plaintiffs-Appellees* v. *Board of Education of the Memphis City Schools, et al.*, Defendants-Appellants, Nos. 72-1630 and 72-1631, in said Court. The Court of Appeals last took action in this case on September 21, 1972, by denying petitioners' motion for a stay of the Court's order pending application for certiorari.

This suit involves the desegregation of the public school system of the City of Memphis, Tennessee. Respondents have invoked the jurisdiction of the United States District Court by virtue of Section 1343(3), Title 28, U.S.C. and Section 1983 of Title 42, U.S.C. This Court may entertain jurisdiction of this petition pursuant to Section 1254(1), Title 28, U.S.C.

III. STATEMENT OF QUESTIONS PRESENTED

A. The petitioners in this case have heretofore operated a zoned neighborhood school system without a system of student transportation. Prior to the present round of litigation in this cause, they have taken affirmative steps to disestablish all vestiges of the dual school system, including faculties, organizations and dual school boundaries. They have also affirmatively reviewed school zone boundaries with a view of increasing desegregation. It is undisputed that whatever racial imbalance of pupils remains in the school system is entirely a product of housing patterns within the City of Memphis. Defendants have presented evidence to show that these housing patterns were not caused by the former dual school system but rather have been found to exist in all major metropolitan areas of this Nation, regardless of the types of school systems which have prevailed. Thus, the first question for review may be stated:

> UNDER THE FACTS OF THE CASE AT BAR, ARE THE RESIDENTIAL PATTERNS IN THE CITY OF MEMPHIS THE VESTIGES OR RESULTS OF THE PRIOR DUAL SCHOOL SYSTEM?

B. Extensive proof was presented before the District Court with regard to the adverse impact which implementation of the District Court's plan would have on public education in the City of Memphis. This evidence included the impact of the plan on educational finance, faculty stability, curriculum and extra-curricular activities and the possibility of maintaining necessary educational initiatives in the system. The second question presented for review may be stated as follows:

DOES THE PLAN OF THE DISTRICT COURT IMPINGE ON PUBLIC EDUCATION AND ON THE EDUCATIONAL PROCESS IN THE CITY OF MEMPHIS TO SUCH A DEGREE AS TO RENDER THE PLAN IMPROPER?

C. In addition to upholding the plan of the District Court, the Court of Appeals for the Sixth Circuit also directed that the District Court prepare a time table for the implementation of further plans of desegregation which would involve a more extensive system of transportation. Petitioners contend that such a direction conflicts with the finding of the District Court that the original plan meets constitutional requirements and conflicts with the holding of this Court in *Swann* v. *Charlotte-Mecklenburg*, 402 U. S. 1 (1971), to the effect that additional year-by-year adjustments of the racial composition of student bodies should not be required. The third question presented thus, is:

DID THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN HOLDING THAT ADDITIONAL REASSIGNMENTS OF PUPILS MUST BE MADE IN FUTURE YEARS IN ORDER TO MEET CONSTITUTIONAL REQUIREMENTS?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents' complaint was filed pursuant to the provisions of Section 1343(3) of Title 28, U.S.C., and Section 1983 of Title 42, U.S.C. These sections provide:

"1343. *Civil rights and elective franchise.* The district courts shall have original jurisdiction of any civil

action authorized by law to be commenced by any person:

. . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

"1983. *Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Respondents' complaint further involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

V. STATEMENT OF THE CASE

This petition for writ of certiorari seeks to have the Supreme Court review a decision of the United States Court of Appeals for the Sixth Circuit.

A. Proceedings in the District Court

This case involves the desegregation of the Memphis City School System, one of the largest urban school systems in the United States. At the time of the hearing appealed from, this school system served 145,581 students of whom 53.6 per cent were black and 46.4 per cent white.[1] The District Court proceedings from which petitioners have appealed were held in response to a remand by the United States Court of Appeals for the Sixth Circuit directing that the District Court review existing plans of desegregation in light of the decision of this Court in *Swann* v. *Charlotte-Mecklenburg*, supra. This decision was filed June 7, 1971, and is reported at 444 F. 2d 1179.

Pursuant to this remand, the District Court designated a team of educational experts provided by the Department of Health, Education and Welfare to draw a new plan of desegregation. A hearing was held, beginning November 15, 1971, to give direction to this team. After the conclusion of this hearing, the District Court, by order of December 10, 1971, directed the team to produce two plans of desegregation. The first plan, which was subsequently designated "Plan A", was to be "based upon the maximum use of pairing of adjacent or nearby schools without transportation, changing zone lines of adjacent or nearby school zones, and closing some schools, plus the minimum use of transportation of students by clustering, pairing, non-contiguous zones or other methods." Plan B was to be based on "an attempt to desegregate all schools necessary to the maintenance of the system so that no school will have a minority race of less

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1. Preliminary enrollment figures for the current school year indicate a decline in enrollment to a total of 139,613 students of whom 57.1 per cent are black and 42.9 per cent white.

than 30%." (Opinion, Dec. 10, 1971, App. p. 17a). Although the H.E.W. team subsequently withdrew from the case, the two plans were prepared by the petitioners' staff at the direction of the District Court. These plans were submitted to the District Court which considered them at a hearing beginning on March 28, 1972. It was estimated that, in addition to numerous students reassigned on a walk-in basis, Plan A would require the transportation of 13,789 children. Plan B would require the transportation of approximately 40,000 children, while a third plan submitted by plaintiffs would require the transportation of almost 62,000 children.

Following the hearing, the District Court, by its order of April 20, 1972, directed the adoption of Plan A to begin at the start of school for the 1972-73 school year.

B. Proceedings in the Court of Appeals for the Sixth Circuit

Petitioners appealed from the decision of the District Court and moved the Court for a stay of the implementation of the District Court's order pending the outcome of the appeal. Respondents filed a cross appeal asking that additional pupil transportation be required. On June 2, 1972, the Sixth Circuit Court of Appeals granted petitioners' request for a stay. Following an expedited hearing of the appeal, the majority of the Court of Appeals on August 29, 1972, vacated the stay and directed the implementation of Plan A. The Court of Appeals also went beyond the order of the District Court in directing that Plan A should be regarded as only the first step in a more massive program of pupil transportation and instructed the District Court to prepare a time table for additional desegregation. Judge Weick, dissenting from the ma-

jority Opinion, pointed out that the evidence before the District Court sustained the Board's contention the racial imbalance of housing patterns were not the vestiges of prior acts of the petitioners and that the order of the District Court was unnecessary and educationally burdensome.

C. Proceedings Since the Court of Appeals' Decision

At the time the Court of Appeals announced its ruling, the school semester had already begun, and on September 22, 1972, the District Court held a hearing to determine the time at which Plan A could feasibly be implemented. In an Opinion dated September 26, 1972, the District Court directed implementation of the plan at the beginning of the second school semester in January, 1973. Because of curriculum and facility difficulties, the implementation of two high school pairings was deferred until the beginning of the next school year.

VI. REASONS FOR GRANTING THE WRIT

Petitioners submit that the present case involves issues of vital importance in the area of school desegregation, especially with regard to the duties of a major urban school system which is confronted with patterns of racial housing typical of major metropolitan areas of all regions of the United States. The case also raises questions as to the feasibility and educational soundness of implementing the order of the District Court in the context of an urban school system which has not previously operated a system of pupil transportation.

A. The Causes of Racial Imbalance

It is undisputed that existing racial imbalance in pupil assignments in this school system is caused solely by the impact of housing patterns in the City of Memphis. In the District Court's Opinion of December 10, 1971, it was noted "The proof unquestionably establishes that the one-race schools do follow racial housing patterns." Moreover, as the District Court noted in its earlier Opinion of May 1, 1970, defendants had complied with their affirmative duty of desegregation, had not gerrymandered school zones, "nor have the defendants failed in the performance of their affirmative duty by their revision of the zone lines."[2]

At the District Court hearings of this cause and especially at the hearing of November 15, 1971, the defendants presented evidence to show that these housing patterns have not been caused by prior acts of these petitioners or their predecessors. Each party called an eminent urban sociologist to testify at the November hearing. The testimony of both the plaintiffs' expert, Dr. Karl Taeuber, and the defendants' expert, Dr. Robert Guthrie, leads irresistibly to the conclusion that the housing patterns in Memphis, like the housing patterns in other metropolitan areas in all sections of the country, have not been caused by the nature of the public school system. At pages 543-44 of the record of the November 15th hearing, Dr. Guthrie stated his opinion that the housing pattern which presently exists in the City of Memphis would be substantially the same if Memphis had never operated a de jure segregated school system. This conclusion was

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2. 312 F. Supp. at 1155.

supported by the writings of the plaintiffs' own expert who observes:

> "No elaborate analysis is necessary to conclude from these figures that a high degree of residential segregation based on race is a universal characteristic of American cities. This segregation is found in the cities of the North and West as well as of the South; in large cities as well as small; in nonindustrial cities as well as industrial; in cities with hundreds of thousands of Negro residents as well as those with only a few thousand; and in cities that are progressive in their employment practices and civil rights policies as well as those that are not." (Ex. 81, page 14, Nov. 15, 1971 Hearing).

It is apparent from the testimony of these witnesses that the causes of the racial housing patterns in the City of Memphis are indistinguishable from the causes of those housing patterns in other metropolitan areas, notably the City of Cincinnati, Ohio, where it has been held that no duty exists on the part of the Board of Education to remedy the effects of racial housing patterns. *Deal* v. *Cincinnati Board of Education*, 419 F. 2d 1387, cert. den. 402 U. S. 962 (1971). This is especially true in light of the fact that population movements which were documented at the November hearing have tended to erase any continuing effects of prior decisions and practices of the Board of Education. The case at bar is thus distinguishable from the *Swann* case, where it was found that previous decisions relating to the location of schools had presented the Court with "a loaded game board." On the contrary, the population studies presented by Dr. O. Z. Stephens indicated that the patterns of racial housing which had occurred during the process of school desegregation had completely altered the effects of prior zone

lines and school locations to the extent that some twenty-six formerly all-white schools had become majority black.[3]

Studies conducted by the plaintiffs' expert, Dr. Taeuber, provide additional evidence that the City of Memphis should not be distinguished from metropolitan areas in other regions of the country on the basis of the former existence of a dual system required by state law. At page 18 of Exhibit 81, Dr. Taeuber compares the degree of actual residential segregation in a group of fifteen major American cities with that of residential segregation to be expected on the basis of economic factors alone. Since Memphis was the poorest of the fifteen cities, its propensity for residential segregation based purely on economic factors is higher than that of any other city listed and yet the degree of residential segregation in Memphis is lower than a number of cities which have much more favorable economic indices. Cleveland, for example, shows a residential segregation index of over 80 per cent while having an economic propensity index of slightly less than 10 per cent. Memphis, with three times the degree of economic propensity for segregation, has somewhat lower housing segregation. Dr. Taeuber finds that the range of actual residential segregation in Memphis is in keeping with that of other metropolitan areas and clearly supports the opinion that the former dual school system did not in fact aggravate the growth of racial housing patterns.

For the above reasons, petitioners submit that the housing patterns in the City of Memphis cannot fairly and

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3. Dr. Stephens pointed out that in his opinion, there was only one point in the school system at which the location of schools pursuant to the dual school system exerted any continuing influence on pupil enrollment. This situation, the Lester-East-Carpenter location, was voluntarily disestablished by the Board of Education at the beginning of the present school year prior to the vacating of the Sixth Circuit stay order.

accurately be viewed as vestiges or effects of the dual school system. This point is of critical importance in light of the former holding of this Court in *Swann* that "We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious or ethnic grounds." 402 U. S. at 22. As defendants have shown at numerous prior hearings of this case, the true vistiges of the dual school system, including dual zone lines, segregated organization and activities, and faculty segregation have been eliminated root and branch from the Memphis system. They have been replaced with programs of racial balance in faculty assignments and with vigorous cultural exchange program which was voluntarily instituted by the Board in 1969 and which has had as its goal the increase of inter-racial contacts and understanding within the school system. Petitioners earnestly submit, however, that the housing patterns of this city are in no sense a vestige of the dual school system and that the efforts and resources of these petitioners should not be dissipated in an effort to overcome them.

B. The Educational Impingement of the District Court's Decision

The evidence before the District Court also made it clear that implementation of Plan A by an urban school system which has not previously operated a transportation program will impinge disastrously on both the finances and the curriculum of the school system. In the area of finances, it was noted that Memphis ranks last in in per-pupil expenditures among the twenty-two systems

in the United States with a pupil population of over 100,000 (Hearing of March 28, 1972, p. 701). The superintendent testified at length to the unmet educational needs of the school system, including the need for additional kindergarten and special education programs.

An additional and highly critical area is the need to provide new initiatives in the education of the very large number of poverty children in the Memphis system. Expert educators pointed out that no studies exist to demonstrate that any additional benefits will result from the involuntary transportation of these children. This testimony was confirmed by the study entitled "The Evidence on Busing" by David J. Armor which was published in the Summer 1972 edition of *The Public Interest* (App. p. 1e). Doctor Armor's study was based on longitudinal data from several projects of "induced busing", including the METCO program in the suburban Boston area. Dr. Armor himself had participated in the design, execution and analysis of the METCO program. The results of these studies are a marked disappointment to the hope that busing will result in appreciable gains in either education or race relations. As Doctor Armor states,

> "None of the studies were able to demonstrate conclusively that integration has had an effect on academic achievement as measured by standardized tests. . ." (App. p. 13e).

It was also found that busing had no impact in raisin' educational aspirations or self concept of the transportea students. Moreover, and to the surprise of Professor Armor, the report concluded that busing had a negative impact in the area of race relations:

"RACE RELATIONS

"One of the central sociological hypotheses in the integration policy model is that integration should reduce racial stereotypes, increase tolerance, and *generally improve race relations. Needless to say, we were quite surprised when our data failed to verify this axiom. Our surprise was increased substantially when we discovered that, in fact, the converse appears to be true.* The data suggest that, under the circumstances obtaining in these studies, integration heightens racial identity and consciousness, enhances ideologies that promote racial segregation, and reduces opportunities for actual contact between the races." (App. p. 16e).

In light of the total failure of the busing programs to find any educational justification, it is not possible to justify the diversion of funds necessary to implement the order of the District Court. The crucial needs of the system are not for transportation but for truly educational programs such as "The Memphis Plan" which was submitted to the District Court. This plan would attempt to deal with the underlying causes of poverty and underachievement by reaching children at an earlier age before learning disabilities become established. Unfortunately, as this Court observed in *Swann*, "One vehicle can carry only so much baggage." The diversion of educational resources and energies which must result from imposing an extensive transportation scheme on an urban school system will inevitably detract from the possibility of the system's implementing programs of educational significance.

The evidence before the District Court also set forth in detail the adverse impact which Plan A will have on

the school curriculum. In addition to the disruption of valuable extra-curricular programs, the disruption of the neighborhood school concept involves a loss of parental contact which educators have shown to be vital in improving achievement levels. It also involves a loss of community support which has historically been a source of strength and added financial resources for the system. A particularly critical area of impingement was the impact of Plan A on faculties. In order to accommodate the extensive pairings and grade reorganizations contemplated by Plan A, it will be necessary to transfer a large proportion of the teachers in the affected schools. This is an especially critical problem in light of the experience of the Memphis School System in the last three years. During this period of time, the Board has complied with the orders of the District Court requiring a racial balancing of school faculties which was completed at the beginning of the current school year. This process has involved the reassignment over a three-year period of some 2,986 teachers. In the opinion of school administrators, a further major reassignment of teachers would have an adverse impact both on the continuity of school programs and on the stability of the overall faculty.

The adverse impact of the District Court's order on the process of public education in the Memphis community is aggravated by the coercive nature of the pupil assignments. As Judge Weick pointed out in his dissenting Opinion, the plan proposed by the District Court ignores the rights of both black and white children who do not want to be bused away from their neighborhood schools. It ignores the liberties and responsibilities of individual parents in directing their children's education—liberties which have been recognized by this Court in *Pierce* v. *Society of Sisters*, 268 U. S. 510, 69 L. ed. 1070.

Implementation of the order of the District Court would require this Board of Education to adopt a philosophy of state control of pupils, which is fundamentally at odds with the philosophy and functioning of every other aspect of American society. The results of such an effort can only be a severe impingement on the entire process of public education in this community.

C. The Sixth Circuit's Additional Instruction to the District Court

An additional issue in this cause is the question of whether the Court of Appeals erred in directing the District Court to schedule further readjustments of pupils. In addition to the plan of transportation already adopted, this direction was given in spite of the finding of the District Court that "The Court earnestly believes that the approved plan meets the requirements of the Constitution." (App. p. 29b). As discussed above, petitioners believe that Memphis has already achieved a unitary school system in which no vestiges of the former dual school system remain and in which no person is effectively excluded from any school by reason of his race. Even if they are wrong in this contention, it is apparent that the implementation of Plan A will obliterate any imaginable effects which the former system might exert on existing patterns of school attendance.

Petitioners, therefore, submit that if the District Court was correct in directing the implementation of Plan A, it was also correct in holding that Plan A meets the requirements of the Constitution. The decision of the Court of Appeals, therefore, is in conflict with the *Swann* decision which held:

> ". . . Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." 402 U. S. at 31-32.

Petitioners would show that over the years, they have complied fully with a variety of court orders which have proposed a final resolution to the problem of desegregation. As early as 1964, the Court of Appeals for the Sixth Circuit commended the inclination of these petitioners to accelerate the schedule of desegregation and proposed a further acceleration which was carried out with the purpose that there should be a final resolution of this matter. In 1966, a consent order was entered by the parties to this case dealing with all aspects of the school system and attempting to resolve the question of desegregation once and for all. Since 1969, a major District Court hearing with regard to the desegregation of the Memphis School System has been held in each calendar year and modifications of the plan have been made at the conclusion of each hearing. During this period of time, the school system has complied with each new proposal of desegregation, both with regard to faculties and with regard to pupils. Defendants submit that both the *Swann* decision and the holding of the District Court in adopting Plan A envisioned a conclusion of this lengthy process so that petitioners may redirect their attention to educational matters which are their primary function.

CONCLUSION

For the foregoing reasons, petitioners submit that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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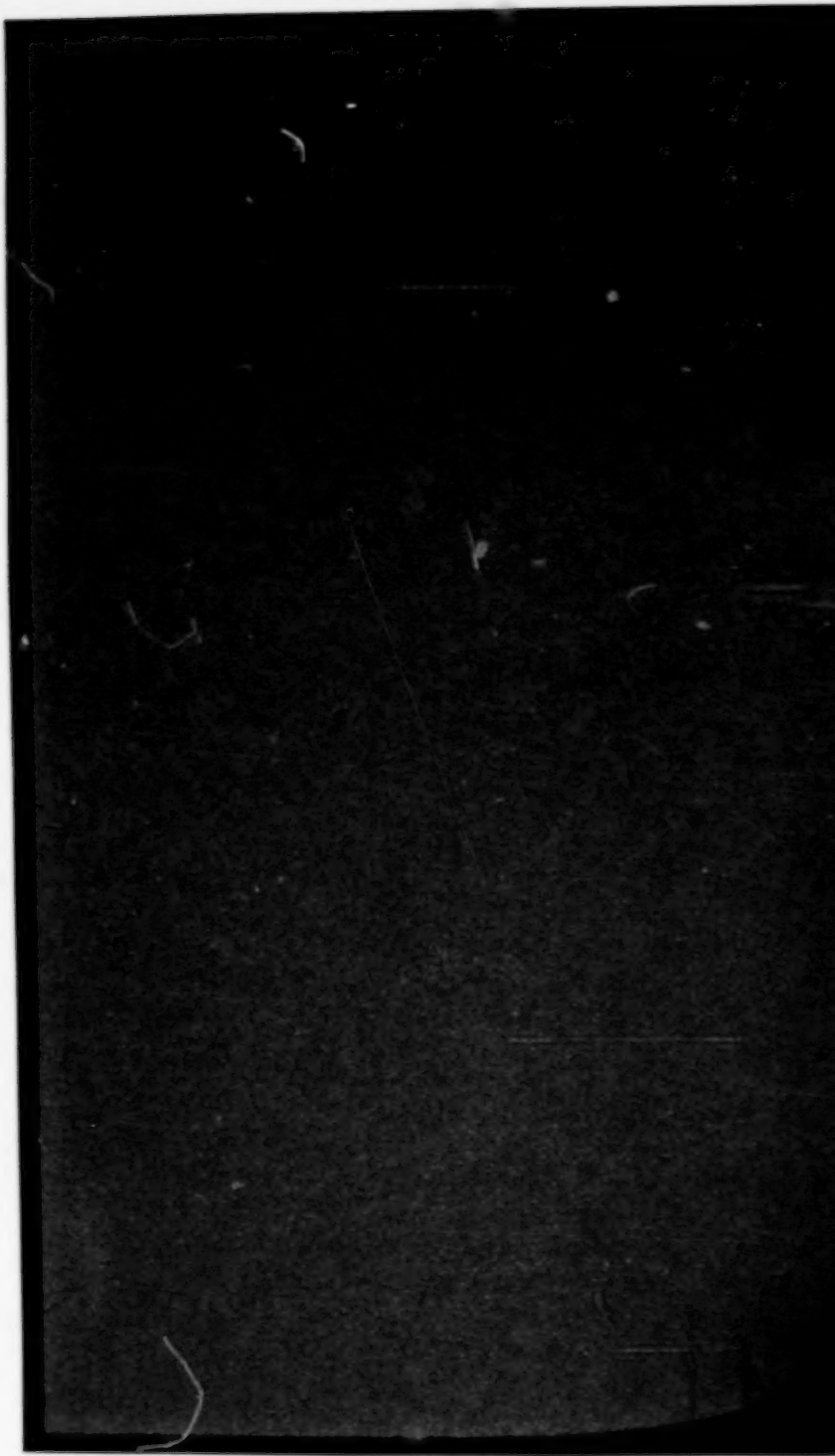
APPENDIX



APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

No. 3931—Civil

DEBORAH NORTHCROSS, et al.,
Plaintiffs,

vs.

BOARD OF EDUCATION, MEMPHIS
CITY SCHOOLS, et al.,
Defendants.

Memorandum Decision

(Filed December 10, 1971)

This school desegregation case, which was originally filed March 31, 1960, has been before this Court and the appellate courts on numerous occasions. It is presently before this Court on a remand from the Court of Appeals for the Sixth Circuit for consideration of defendant system's plan of desegregation in the light of *Swan* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *School Commissioners of Mobile City*, 402 U.S. 33 (1971). *Northcross* v. *Board of Education of Memphis City Schools*, 444 F2d 1179 (1971). After the remand this Court met with counsel and determined that both sets of parties were of the opinion that outside advisory assistance was appropriate for this case. However, the parties did not agree on who should furnish the assistance. The Court resolved the difference by selecting the Division of Equal Educational Opportunities of the United States Office of Education (hereinafter called the Division) to designate

qualified personnel to assist the defendant Board in the light of the Court of Appeals remand. On July 27, 1971, the Court entered an order to that effect and the defendant Board complied with the order by requesting assistance from the Division. The Division designated a team of four members and two consultants, all of whom were educators. The order directed the team to make an immediate preliminary investigation, to report to the Court and the parties the results thereof, and to ask for further instructions, if necessary.

The team made the preliminary report and make a request for further instructions. These, in the opinion of the Court, raised legal issues referred to in *Swan* and *Davis* and in the Court of Appeals opinion ordering the remand. The Court, therefore, entered an order on September 14, 1971, ruling that an evidentiary hearing was necessary before more specific guidelines could be furnished the team. In that order the Court directed counsel to suggest what the issues should be for the preliminary hearing.[1] On September 28, 1971, the Court entered an order setting forth four issues and directed the defendant Board to file, prior to the hearing, those changes in the Board's existing plan of desegregation which it believed were required in the light of *Swan*, *Davis* and the Court of Appeals remand opinion. The Court conducted an eight day preliminary evidentiary hearing.

One of the issues which the Court prescribed for the hearing was as follows:

> "Are the one-race schools, or virtual one-race schools, genuinely nondiscriminatory; that is, are they not the

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1. It is interesting to note that no pleadings have been filed in this Court since 1968. The 1970 and 1971 hearings have been conducted on remands based upon authorities not available at the time of the Court's various rulings.

result of present or past discriminatory action on the part of the defendants or their predecessors?"

This issue is addressed primarily to Section V(2) of the *Swann* opinion on page 25, which directs the Court to scrutinize schools of one race when the plan of the Board contemplates the continued existence of some schools that are all, or predominantly all, of one race. In such situations, the burden is upon the school authorities to satisfy the Court that the racial composition is not the result of past or present discriminatory action on their part.

The defendant Board undertook to overcome this burden by showing that the large number of one-race schools are the result of housing patterns over which it had insufficient control.

During the current school year (1971-72), the defendant system is based upon a curriculum arrangement of elementary schools of grades 1 through 6, junior high schools of grades 7 through 9 and high schools of grades 10 through 12. There are 145,581 pupils, 53.6% of them are black and 46.4% of them are non-black (hereinafter referred to as white). Percentagewise, 87.7% of the blacks are in 90% or more black schools and 76.4% of the whites are in 90% or more white schools. There are 162 schools, 67 of them are 90% or more black and 61 of them are 90% or more white (29 are all black and 18 are all white). Percentagewise, 37.6% of the 162 schools are 90% or more white and 41.3% are 90% or more black.

Pursuant to previous orders of this Court the present pupil assignment phase of the defendant system's desegregation plan is basically a geographic zone plan with minority to majority transfers prohibited.

The proof unquestionably establishes that the one-race schools do follow racial housing patterns. Therefore, the

The out-migration included as one of its major components white racial discrimination against Negroes. The various departments of the federal, state and local governments, private agencies which affect real estate development, and the City and County Boards of Education effectively precluded Negroes from participating in the out-migration.

The proof shows that from 1934 until 1947, the Federal Housing Administration encouraged racial restrictions, and until recently, it permitted them by a passive posture of non-discrimination. This federal agency has had and still has the most significant impact upon new housing.

The Memphis Housing Authority, a state created agency which offers low rent and subsidized housing to economically deprived persons in Memphis (predominantly black), practiced open and out-right segregation until 1965, and then went through a series of freedom of choice policies which permitted the customs of the community to continue segregation in those facilities.

The Realtors of Memphis prescribed policies which forbad racial mixing in housing patterns. Formerly, the Memphis zoning regulations required the designation of the racial makeup of proposed subdivisions and, otherwise, permitted the white citizens to capitalize upon their economic and educational advantages.

In addition to the pressure and preference of the white community and the agencies mentioned above, some of the lending institutions discriminated against blacks, thereby preventing them from joining the whites in the out-migration.

As a consequence of the white out-migration, those blacks who could afford to move out of the areas originally

assigned to them made suburbs of the inner city areas which were adjacent to the areas assigned. All the while the defendant Board became an active partner in the entire process. This Court included in its unreported opinion of May 15, 1969, a quote from page 61 of the 1967 Report of the United States Commission on Civil Rights (Racial Isolation in Public Schools) which reads in part as follows:

> "At the time of the Brown decision, Southern educators were aware that the location of schools was an important factor in maintaining segregated school attendance patterns. A story in a Memphis, Tenn., newspaper on May 18, 1954, is illustrative:
>
> " 'Ruling Fails to Shock City: Officials See Little Difficulty
>
> " 'School authorities in Memphis yesterday evidenced no surprise at the (Brown) decision . . . Mr. Milton Bowers, Sr., President of the Memphis Board of Education, said 'We have been expecting this to happen for a long while . . . We believe our Negroes will continue using their own school facilities since most of them are located in the center of Negro population areas . . . (Negro schools are) fully equal to and in some instances better (than white schools). We are very optimistic about this (ruling).' "

The white community's racial hostility has caused some neighborhood areas, and consequently the nearby schools, to change from white to black as blacks moved in. The Board has made isolated attempts to avoid this problem. This is done by controlling the number of whites in a school in a majority ratio of not below approximately 60% or 65%. However, this practice increases or does nothing about the problem of the all black or virtually all black

schools. For example, this year the Board has continued to maintain Maury Elementary School at 37% of its optimum capacity in order to avoid assigning 133 white pupils to a predominantly Negro school, thereby risking white flight from a presently predominantly white inner city area. In the area to the south of Memphis, it has deliberately assigned approximately 200 Negro pupils, newly enrolled in the area through a housing project, to an overwhelmingly black school in preference to the nearby Raineshaven School where the racial ratio is presently 350 whites to 104 blacks.[5]

In addition, the proof reflects that attempts have been made by administrative personnel of the Board to influence the size and location of federally-funded subsidized housing projects. These projects often involve large numbers of people and therefore greatly concern the Board and its Department of Research Evaluation and Development. The Board contends that it has attempted to have the projects located in areas where they will promote desegregation or, at least, minimize segregation. However, the locations of projects are subject to so many factors that the limited use of persuasive powers of Board personnel have had little effect on the housing segregation patterns of the community. Initially, the projects are subject to available funds as well as to available land locations. The policies and actions of the local and federal agencies are also involved, and invariably, neighborhood or community opposition is raised to a particular site, especially when ob-

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5. The practice points up one of the inconsistencies of the Board's desegregation efforts. The record will reflect that the Board and its former superintendent have opposed the use of minimum ratios to implement desegregation, but the Board uses ratios by freezing the percentage of blacks in a white school at 35% or 40%, in an attempt to prevent white flight from a neighborhood.

vious racial housing mixing becomes a factor. If a heavily concentrated black area is chosen for the location of the project, blacks contend that segregated housing is being more heavily entrenched. On the other hand, if a predominantly white area is chosen for the location, white hostility undertakes to stop the project and some whites will move if the project is built.

Due to the many factors over which the Board has no control in the site selection, the Court concludes that the present Board is not a participant in the specific issue of housing segregation caused by low rent or rent subsidy projects *recently* planned and built. This is not to say, however, that the Board cannot or should not make pupil assignments which affect desegregation of the schools in the light of those projects after completion. The Board has recently done this with regard to a project opened after school started this year in the southeastern portion of the city. Two hundred newly enrolled pupils were assigned to the predominantly white Oakhaven school in preference to reopening the formerly all black Getwell School which was closed at the end of the 1969-70 school year as a desegregation effort.

An examination of the short history of one of the newest sets of schools in the system and a comparison of them with an older school is enlightening. The Ridgeway Schools are the easternmost schools in the system. Ridgeway Elementary School and Ridgeway Junior and Senior High School are located on a 28.04 acre tract in an area which has a relatively high residential land value. These schools were built in an area annexed into the City of Memphis on December 31, 1969, and were opened during the 1970-71 school year. The buildings were not ready for occupancy at the beginning of the school year. Therefore, it was necessary to bus the students approximately six

miles one way on chartered buses to another school pending completion. The Ridgeway students were transported to Grahamwood Elementary School because it is in the area of Memphis which has a declining elementary school population and it has substantial unused classroom space. Grahamwood has an optimum capacity of 1060 pupils and a maximum capacity of 1245 pupils. In 1970 it had 552 pupils enrolled. This year it has 486 pupils. It was built in 1950 and had additions made to it in 1953, 1955 and 1963. Neither changing racial housing patterns nor any other racial factor has caused the decline in enrollment. It was built as a white school, and its racial makeup has been all or overwhelmingly white.

Ridgeway Elementary School, with an optimum capacity of 440 pupils, has 364 pupils. Its Junior and Senior High, with an optimum of 850 pupils, has 961 Seventh through Eleventh grade pupils. As indicated above, the two schools are on a tract 28.04 acres in size. Whereas, one of the oldest black schools in the system, Manassas Junior and Senior High, originally built in 1927, has 2141 pupils in buildings with a current optimum capacity of 1700 pupils and a maximum capacity of 2100 pupils. It is on a tract 6.63 acres in size. Manassas School had nine additions to it from 1939 through 1964.

The predecessors of the incumbent Board have accommodated the white housing discrimination in many ways, such as drawing the black Dunbar Elementary zone, during the last elementary school dual system year, 1961-62, as a zone approximately five miles wide with the black school in the westernmost area. See Exhibits 47b and 52b, 1960 Census map and overlay. While it is true that the blacks at that time lived in the immediate area of the Dunbar School, the location of the school in the western area of the zone

designed by the Board would certainly deter a black from moving into the eastern area of the zone.

In addition, the predecessors of the defendant Board deterred Negro migration into certain areas of the Frayser community after it was annexed in December, 1958. This was accomplished by entering into a contract with the county to bus the sparsely located Negro pupils to Negro schools in the county to avoid assigning them to the already established white schools in the Frayser area, or in the alternative, providing separate and equal facilities for the blacks.

The location and construction of schools by school authorities is a factor to be considered in the determination of the discriminatory actions of a school board. *Swan*, page 21; *Davis* v. *School Dist. of Pontiac*, Mich., 443 F. 2d 573 (1971), affirming (E.D. Mich.), 309 Fed. Supp. 734 (1970).

In *Swan*, the Supreme Court said:

> "The objective is to dismantle the dual school system. 'Racially neutral' assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a 'loaded game board', affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral." Page 28.

In 1917 the Supreme Court held unconstitutional a Louisville, Kentucky ordinance which prohibited white and "colored" from occupying residences in a block wherein the greater number of residences were occupied by the opposite race. *Buchanan* v. *Warley*, 245 U. S. 60. The opinion by Mr. Justice William R. Day analyzes various cases of the Supreme Court which had involved segregation of the races in the light of the Fourteenth Amendment. Following that analysis the opinion contains the following paragraph:

> "That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges." Supra, at page 80.

In regard to the over-all issue of one-race schools, this Court concludes that the proof establishes that the defendant Board and its predecessors have played a significant role in establishment of the present large number of one-race schools which have resulted from discrimination by numerous persons and groups. Therefore, it is incumbent upon the Court to require the Board to request that the team of the Division make recommendations to the defendant Board for ways that it should amend its present plan of desegregation to the end that the Memphis schools will be in compliance with the Constitution of the United States.

A second issue set forth in the order of the Court which called for the preliminary evidentiary hearing was as follows:

"What limitations should be placed upon the team of educators heretofore designated by the Division of Equal Educational Opportunities to make recommendations to the defendant Board for further desegregation of the defendant system?"

The defendant Board and its administrative personnel earnestly assert that the one-race school dilemma should not be resolved by any form of transportation of students to correct the racial imbalance. However, it is apparent that the segregation evidenced by the one-race schools caused by discrimination cannot be effectively eliminated in the near future without transporting some students.

Repeatedly, the Supreme Court has held that the conversion from the dual systems to the unitary system is judged by its "effectiveness". *Swan*, at page 25, *Alexander* v. *Holmes County Board*, 396 U. S. 19 (1969); *Green* v. *County School Board*, 391 U. S. 430 (1968).

In *Davis*, page 37, the Supreme Court said ". . . the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation."

Swan holds that the Court may not "require . . . any particular degree of racial balance or mixing" (Page 24). However, in *North Carolina St. Board of Education* v. *Swan*, 402 U. S. 43 (1971) the Supreme Court noted that the assignment of pupils on the basis of race is a proper method to correct an existing unconstitutionally segregated imbalance. *Swan* holds that transportation of students where necessary in the conversion of a dual system to a unitary system is appropriate (Page 29-31). The Court of Appeals remand opinion indicates that some busing may be mandatory for this system (444 F. 2d 1183). However, trans-

portation of students may be validly objectional "when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process" (*Swan*, page 30). It should also be noted that *Swan* mentions that eighteen million of the nation's public school children, approximately 39% of the total, were transported to their schools by bus in 1969-70 (Page 29).

The above principles and holdings are guidelines.[6] The determination of what is an effective plan that is feasible and practicable is difficult for this system for many reasons. For example, the race discriminated against is, in fact, the majority race; the defendant system has never provided transportation for students; and the present plan of desegregation, including the location of new schools, has been in some measure sanctioned by this Court and the appellate courts.

Many of the schools have been built or added to since *Brown* v. *Board of Ed. of Topeka*, 349 U. S. 294 (1954). It should be noted that the early reaction to the Brown case was that the school authorities met their responsibility if they did not deny any person the right to attend a school on account of race. See *Briggs* v. *Elliott*, 132 F. Supp. 776, 777 (E.D. S.C., 1955) (Three Judge Court).

Early in the long history of this case the Court of Appeals for the Sixth Circuit, in 1962, said:

> "Minimal requirements for nonracial schools are geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right." 302 F. 2d at page 823.

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6. The Court of Appeals noted in its opinion that there are some features of this case which are distinguishable from *Swan*, 444 F. 2d 1183.

The defendant system was also permitted to embrace the widely used concept of basing its desegregation plan upon the voluntary choice of its students or their parents. This was considered by many to be a permissible method of desegregating former dual systems until 1968, when the opinions in *Green, Raney,* and *Monroe* were filed, 391 U. S. 430, 443, 450. In *Green* the court referred to the affirmative duty to desegregate which a school board has.

Since that time this Court has approved the Board's basic geographic zone plan, without busing, subject to the modifications which this Court required in the light of the then announced opinions. After the present remand, pursuant to *Swan,* pages 26 and 27, this Court ordered the defendants to reopen the transfer period prior to the commencement of the current school year and to offer transportation on the public transit authority's regularly scheduled facilities at Board expense for all pupils who wished to transfer from a majority assignment to a minority assignment. This prompted 249 additional requests for transfers.

This Court concludes that the recommendations to be made by the team, educationally, should be sound and practical ways of achieving the greatest possible degree of desegregation in the light of the circumstances which now exist.

On Page 22 and 23 of *Swan,* the Supreme Court stated:

> "The target of the cases from *Brown* I to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the

important objective of *Brown* I to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination."

The impact of school desegregation on other forms of discrimination in the community referred to in *Swann* cannot be an immediate panacea for all of the many problems to which racial discrimination has contributed. These problems include poverty among many Negroes, housing segregation and racial prejudice and hostility. Punitive motives for wrongs of the past should not play a part in recommendations to correct the present racial imbalance.

The hearing was primarily for the purpose of determining what guidelines should be given the team of educators who will make a further investigation into the facts and make specific recommendations to the defendant Board. Therefore, the Court did not permit any proof on the methods to be used for further desegregation and the feasibility of the possible methods. This will be done after the recommendations are made. At that time the Court will also consider the feasibility of the plan which plaintiffs wish to offer through the expert hired by them.

Because this system's desegregation problems are so complex, the Court is of the opinion that the team should be requested to file alternate sets of recommendations. One set of recommendations shall not have any minimum or maximum percentage factor. It shall be based upon the maximum use of pairing adjacent or nearby schools without transportation, changing zone lines of adjacent or nearby school zones, and closing some schools, plus the minimum use of transportation of students by clustering, pairing, noncontiguous zones, or other methods.

The term "minimum use of transportation" cannot be precisely defined by time or distance due to the size and location of streets, traffic congestion and other factors. The term is meant to refer to the use of transportation for certain particularly adaptable areas or situations, to the end that one-race schools shall be minimized. The term is intended to mean less than city-wide transportation. It could mean, if necessary, an initial phase of eventually overcoming one-race schools completely in conjunction with future construction, coupled with the future use of more transportation.

The other set of recommendations shall be based upon an attempt to desegregate all schools necessary to the maintenance of the system so that no school will have a minority race of less than 30%. This set of recommendations shall not be based entirely on busing. It, too, should make use of other desegregation methods before transportation is to be used.

Both sets of recommendations shall be subject to the transportation limitation referred to in *Swan* on page 30, namely, that the time or distance of travel must not be "so great as to either risk the health of the student or significantly impinge on the educational process."

All recommendations shall be limited to changes which are educationally sound in the opinion of the members of the team and in the light of the mandate of the Supreme Court to obtain the greatest possible degree of actual desegregation taking into account the practicability of the situation. Any school necessary to the maintenance of the system which cannot be desegregated under these limitations must remain one-race or virtual one-race schools until housing patterns change or new schools are provided. *Swan*, page 25.

Because the team is composed of educators they shall not be charged with determining the economic feasibility of their recommendations. They are directed to determine the estimated cost of the transportation which they recommend, and in order to do so, they should request additional assistance in the form of experienced consultants for this phase of the recommendations. The Court will then hear proof on the economic feasibility or practicability of transportation as a remedy for the one-race schools.

The team should consider in its recommendations the already determined annexation for another southern portion of Shelby County into the City of Memphis, effective for school purposes at the beginning of the school year 1972-73. The team should also consider what effect the presently proposed plans of the Board for new site acquisitions and school construction will have on desegregation and make recommendations in the light thereof. The team should also consider the changes in the plan proposed by the Board, including the elimination of optional attendance of students living on boundary streets and on streets designated as "pockets and coves"; the clustering and pairing of Oakville, Goodlett and Shefield Schools; and the zone changes to be made for Lester-Carpenter, East and Treadwell Schools. With regard to the Lester-Carpenter, East and Treadwell plan changes, the Board is directed to file the specific provisions of those proposed changes within two weeks from the date of the filing of this decision.

Prior to the recently concluded hearing, the Board filed a 50 page brochure on the front of which was printed, "The Memphis Plan". This pamphlet includes an argument against desegregation of schools by the use of busing which ignores certain basic constitutional principles enunciated by the Supreme Court. The writer of the pamphlet also

proposes a new direction in education in Memphis whereby the Board will undertake, by educational and socially oriented projects, to attack the effects of prior racial discrimination on the entire community. While some of the motives of the brochure are laudable and clearly within the Board's power to pursue, the proposals are indefinite and the money has not been approved for these innovative ideas. In the opinion of the Court this document contains more propaganda than substance and, therefore, should not be considered as a desegregation plan which would meet the requirements of *Swan* and *Davis* and the remand of the Court of Appeals.

The proof in the hearing also establishes other factors which the team should carefully consider. There are many schools in which there is excess classroom space based upon both the optimum and maximum capacities.[7] While there is no invariable pattern, many of these schools are older, where the facilities require more maintenance costs and the size of the tract on which the school is located does not meet modern standards.

The more recently annexed areas contain, as a general rule, larger school zones. This is due to less density of population. Before the annexation these areas were afforded transportation if the pupils lived more than one and a half miles from the school. Furthermore, it would appear that transportation of pupils has advantages to offer in those areas, in addition to overcoming racial imbalance, such as the safety of the students by not having to walk along thoroughfares for great distances in some cases.

The proof reflects that the area in the south part of Memphis to the Mississippi line has definite school racial

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7. The optimum capacity is less than the maximum because it is based upon a use of the facilities which contemplates special educational programs which require work space.

patterns with regard to the present schools. The black schools are in the western sector, for the most part, and the white schools are in the eastern sector with the several mixed schools between the two sectors.

In the Frayser area, the northernmost area of the city, sixteen of the seventeen schools are all white, or virtually all white; whereas, the portion of Memphis which is immediately south of Frayser is overwhelmingly black. It would appear if transportation is employed, that the Wolf River and its unoccupied adjacent bottom lands, which separate Frayser from the remainder the city, would not be an insurmountable barrier to desegregation.

There is in the center of the city an area which has not yielded to the changing racial neighborhood patterns. Primarily, on its own, this area has withstood the problem of white flight as some blacks have moved into or transferred enrollment into the area. This area deserves most of the credit for the desegregation that does exist in the system. For example, it contains Bruce Elementary School, one of the four formerly white schools to which a total of 13 blacks was assigned when the system first broke the color line in 1961, seven years after *Brown* I. The other three schools and many other additional ones in other parts of the city have flipped from white to black, but Bruce this year has 260 white and 223 black pupils. This area also contains Central High School, built in 1911 as a white high school. It has now 582 white and 437 black students.

The census figures indicate that this area is declining in both white and non-white citizens. Therefore, the Board has, and presumably will continue to have, schools with classroom vacancies in this area. However, it appears to be beneficial to take advantage of the willingness of citizens of that area to accommodate desegregation without a

total change of racial patterns in the residential and school populations.

A third issue which the Court set forth in its order setting the hearing was stated as follows:

> "Should the administrative zones of the defendant system which became effective July 1, 1971, be treated as independent systems for desegregation recommendations?"

This inquiry was made by the team after its preliminary investigation. Very little proof presented at the hearing addressed itself to the issue. These administrative zones were adopted after a study was made concerning the advisability of a program of decentralization of the administrative machinery of this large system. The geographic area of the entire system was divided into four zones and area superintendents were appointed to the end that the system would have closer contact with its patrons. The zones do conform to school zone boundaries, but the administrative zone program was not designed as a vehicle for implementing a different method of desegregation, and it does not appear that the program was based upon discrimination. Therefore, the Court concludes that the team should use its own discretion in the determination of how the administrative zones should effectuate its recommendations. However, it would appear that, other things being equal, interzone problems of an administrative nature should not be created if they can be avoided.

A fourth issue designated for the hearing was stated as follows:

> "What is the effect on desegregation of the portion of the existing plan which permits minority to minority and majority to majority transfers between zones?"

At the final prehearing conference an auxiliary issue was added at the suggestion of counsel for the plaintiffs as follows:

> "Should transfers into the defendant system from other school systems be limited so that transfers will be granted only in a manner which enhances school desegregation?"

Under the existing plan transfers from a majority zone school to a minority zone school are given first preference. Then, if space is available, students are allowed to transfer from majority to majority and minority to minority situations. Transfers for the following school year for all pupils already in the system are required to be requested in the spring of each year based upon the racial makeup of the school determined shortly after the first of January. The actual transfer is not granted until all of the requests are processed during the summer.

For the current year the transfers were granted as follows:

Majority to minority — 1337
Majority to majority — 8434
Minority to minority — 278

Majority to majority transfers were allowed by the Court to permit the students and patrons to accommodate personal and necessary changes of schools without affecting the majority racial makeup of any school. However, the proof establishes that the present plan permits, in some instances, what the Court is trying to defeat. For example, Fairview Junior High School is a school which was built as an all white school in 1930, and it remained all white in its attendance until 1965-66. It has an optimum capacity of

864 students and a maximum capacity of 950. In recent years it has experienced an increasing black enrollment but an overall steadily declining total enrollment. In the school year 1969-70 it had 410 students, 266 of whom were white and 144 of whom were black. Before the commencement of the 1970-71 school year its zone boundaries were changed which resulted in an attendance of 316 whites and 212 blacks. Therefore, for transfer purposes it remained a school which was majority white. This year it has 252 whites and 309 blacks. However, the transfer records indicate that the junior high school students who actually live in the zone are made up of 432 white and 278 black students. Therefore, 190 white students have transferred to other white schools as members of the majority race, but by actual attendance Fairview is now a majority black school.

A similar problem at Bellevue Junior High School was met by declaring it a majority black school based upon the attendance in 1970-71 of 315 whites and 385 blacks. 209 majority to majority black transfers were granted for the current year; whereas, the racial makeup of junior high school students who actually live in the zone is 202 white and 186 black.

Other zones also reflect substantial white transfers when the black population approaches the white, even though the actual majority race has not changed. Central High School has attendance figures of 437 black students and 582 whites for a total of 1019 in facilities with an optimum capacity of 1200 students. However, the makeup of the students actually living in the zone is 97 blacks and 688 whites.

From the proof it is apparent that adjustments should be made to the majority to majority transfer provisions if

the existing plan of desegregation were to be continued. However, because the Court has directed the team to present recommendations pertaining to the student assignment plan of the Board, the Court will not prescribe any changes in the transfer provisions at this time. The members of the team are directed to consider the nature and results of the present transfers in determining their recommendations on what transfer provisions, if any, should be incorporated in the desegregation plan of the Board in the light of their other recommendations.

With regard to the auxiliary issue pertaining to nonresident transfers, the proof shows that during the present year there are a total of 198 nonresident students attending 45 of the defendant schools. Most of these students live in Shelby County outside the corporate city limits.

Under the present plan the defendants must assign them to a school which has the same majority race as the one to which they would be assigned if they attended public school where they live. There is no proof to show that the defendants are not complying with the plan, and the number of pupils has such a negligible effect on the racial makeup of the defendant schools that this Court is of the opinion that no change should be made in the existing plan at this time.

For further guidance of the team, the Court is of the opinion that it should take judicial notice of the widespread hostility to busing students as a means of correcting the imbalance. This hostility creates grave problems for the team, the Board, the Court, the staff, the teachers and the students. However, the law is clear and emphatic that a school board may not continue to maintain a segregated system because there is disagreement with the necessary methods of desegregating the system. *Monroe* v. *Board of*

Commissioners, Jackson, Tennessee, 391 U. S. 450, 459 (1968).

Our system of government contemplates that differences, properly sought to be resolved in the courts, shall be determined on the basis of the facts presented in court and the law applicable to those facts presented under the court's rules of procedure. A court is not permitted to vary from the law due to influence or pressure from those who do not agree with the requirements of the law. This Court is committed to that principle and will follow it to the best of its ability. The Court expects the members of the team designated by the Division also to reject all pressures from outside sources. To that end, the Court reiterates a portion of its order wherein the Court requested the Division to assist this Board. This Court in its Order Pertaining to Assistance, entered July 27, 1971, provided as follows:

> "The role of the Division and its designated personnel shall be to obtain the necessary factual information and to make objective recommendations in the light thereof. Such recommendations shall be based upon sound educational policies with due regard for the constitutional rights of all persons within the geographical limits of the defendant system."
>
> "Any attempt to interfere with or influence the objectivity of the recommendations by any person or group shall be ignored by the Division personnel and reported to the Court as soon as possible."

The team is directed to commence immediately to further investigate the defendant system in the light of this decision and to present its recommendations to the Board with a copy to the Court and to counsel for the plaintiffs as soon as possible. Counsel for the plaintiffs are also directed to

reduce to writing the recommendations for changes in the existing plan which they advocate. These recommendations will be filed with the Court and with counsel for the defendants within two days after the recommendations of the team are delivered to counsel for the plaintiffs.

This 10th day of December, 1971.

/s/ Robert M. McRae, Jr.
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

No. 3931—Civil

DEBORAH A. NORTHCROSS, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION, MEMPHIS
CITY SCHOOLS, et al.,

Defendants.

Memorandum Decision

This Memorandum Decision pertains to the most recent hearing in this twelve-year-old case which was filed by the original plaintiffs as a class action seeking equal protection of the laws by the desegregation of the defendant school system. The defendant system had maintained racially separate public schools contrary to the holding of *Brown* v. *Board of Education,* 347 U.S. 483 (1954).

For the purpose of this ruling, it is not necessary to delineate in detail the early proceedings in this case. Suffice it to say, the Court of Appeals for the Sixth Circuit in 1962 and 1964, after appeals from this Court by the plaintiffs, remanded the case for further proceedings. 302 F2d 818, 333 Fed. 661. In 1966 the defendants inaugurated a freedom of transfer plan, and, for the first time, completely abandoned the practice of assigning students on the basis of race.[1] No further proceedings were had in the cause

1. The 1964 opinion of the Court of Appeals reflects that the defendants accelerated their grade-a-year plan so that all the Negro pupils would be allowed to attend desegregated schools in 1970 instead of 1972 but the Court of Appeals suggested that it be further accelerated in 1966.

until August 1968, when the plaintiffs filed a Motion for Further Relief based upon *Green* v. *County School Board*, 391 U.S. 430 (1968), and its companion cases, *Raney* v. *Board of Education*, 391 U.S. 443 (1968), and *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968). That motion of the plaintiffs sought the elimination of the free transfer plan of the defendants and, among other things, complete faculty desegregation. On May 15, 1969, this Court ordered additional faculty desegregation for the 1969-70 school year and approved a modification of the transfer provision. The Court also held that the existing and proposed supplemental plans of the defendants did not have real prospects for dismantling the state imposed dual system at the earliest practicable date. Therefore, the defendants were directed to file with the Court, prior to January 1, 1970, proposals for revised zone boundary lines with enrollment figures by race to enable the Court to reconsider the adequacy of the transfer plan. That ruling of this Court was appealed by the plaintiffs. While the appeal was pending, the Supreme Court of the United States rendered its opinion in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969). Applications for extraordinary relief were sought by the plaintiffs in both the Court of Appeals and the Supreme Court. On March 9, 1970, the Supreme Court of the United States held that this Court's 1969 finding, that the Board's plan did not have real prospects for dismantling the state imposed dual system at the earliest practicable date, was supported by substantial evidence. The case was remanded with directions that this Court proceed promptly to consider the issues before it and to decide the case consistently with *Alexander* v. *Holmes County Board, supra. Northcross* v. *Board of Education, Memphis City Schools*, 397 U.S. 232 (1970).

Pursuant to that remand this Court conducted further evidentiary proceedings and on May 1, 1970, ruled that under the then existing plan the defendants were not maintaining a unitary system as required by *Alexander* v. *Holmes County Board, supra.* This Court ordered further modifications to the desegregation plan of the defendants. With regard to pupil assignment, the Court ordered that the Board not permit any student to transfer from one geographical zone where he was in the minority race to another zone where he would be in the majority race. In that ruling the Court also ordered the defendants to seek the assistance of the Title IV Educational Opportunities Planning Center at the University of Tennessee, concerning its plan of faculty desegregation. *Northcross* v. *Board of Education, Memphis City Schools,* 312 F.Supp. 1150 (W.D. Tenn. 1970). Subsequently, the Court ordered complete faculty desegregation by requiring that the racial composition of the faculty of each school comply with the ratio of white and Negro teachers in the entire system within a 10% plus or minus tolerance. The defendants were allowed two years to place that faculty plan in effect, and, at the present time, they are operating under that plan.

The student assignment phase of the May 1, 1970, ruling of this Court was appealed by the plaintiffs, and on June 7, 1971, the Court of Appeals filed its opinion wherein the cause was remanded to this Court for consideration of the defendant system's plan of desegregation in the light of *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), and *Davis* v. *School Commissioners of Mobile City,* 402 U.S. 33 (1971). *Northcross* v. *Board of Education, Memphis City Schools,* 444 F2d 1179 (June 7, 1971).

After the remand, the Court and counsel for both sets of parties were of the opinion that outside assistance was appropriate for the pupil assignment phase of the case.

The Court sought assistance from the Division of Equal Educational Opportunities of the United States Office of Education. Pursuant to the Court's direction, the defendants requested assistance from that Division, and a seven man team of educators was appointed by the Title IV Director of the Division to assist the Board and the Court.

After an initial investigation, the team requested further instructions from the Court. The request caused the Court to conclude that a preliminary evidentiary hearing was necessary in the light of *Swann* and *Davis* and the issues in the case. In November 1971, an eight-day evidentiary hearing was conducted and on December 10, 1971, this Court rendered its opinion on the issues therein. In that ruling the Court cited Section V(2) of *Swann* on page 25 which directed the district courts to scrutinize schools of one race when the plan of desegregation of a school board contemplates a continued existence of some schools that are all, or predominantly all, of one race.

The Court found the pupil attendance under the existing plan to be as follows:

> "During the current school year (1971-72) the defendant system is based upon a curriculum arrangement of elementary schools of grades 1 through 6, junior high schools of grades 7 through 9 and high schools of grades 10 through 12. There are 145,581 pupils, 53.6% of them are black and 46.4% of them are nonblack (hereinafter referred to as white). Percentagewise, 87.7% of the blacks are in 90% or more black schools and 76.4% of the whites are in 90% or more white schools. There are 162 schools, 67 of them are 90% or more black and 61 of them are 90% or more white (29 all black and 18 are all white.) Percentagewise, 37.6% of the 162 schools are 90% or more white and 41.3%

are 90% or more black." Page 3, Dec. 10, 1971 Opinion.

After the remand by the Court of Appeals on June 7, 1971, and prior to the commencement of the school year, this Court ordered the defendants to reopen the transfers and permit any pupil to transfer from an attendance zone wherein the pupil was in the majority race to a zone where he would be in the minority race, with a proviso that the defendants would afford transportation for the transferring pupil at Board expense on existing public transportation facilities. This reopening of the transfer policy prompted 249 additional requests for transfers, bringing the total for the current year to 1337 majority to minority transfers.

Prior to the November hearing, the Court required the defendants to indicate what changes in the plan of desegregation they then thought should be made in the light of *Swann* and *Davis*. The defendants proposed a modification of their existing plan of desegregation by discontinuing the practice of allowing optional attendance of students living on zone boundary streets and on streets heretofore designated as "pockets and coves". The Board further proposed that three schools in southeast Memphis be clustered and paired in 1972-73, due to the opening of a housing project in that area after the current school year commenced. The Board further proposed zone changes with regard to Lester-Carpenter, East and Treadwell Schools, due to the fact they admitted that the Lester and East zones were based upon a vestige of the former dual system.

On page 12 of its ruling of December 10, 1971, this Court concluded as follows:

"In regard to the over-all issue of one-race schools, this Court concludes that the proof establishes that

the defendant Board and its predecessors have played a significant role in establishment of the present large number of one-race schools which have resulted from discrimination by numerous persons and groups. Therefore, it is incumbent upon the Court to require the Board to request that the team of the Division make recommendations to the defendant Board for ways that it should amend its present plan of desegregation to the end that the Memphis schools will be in compliance with the Constitution of the United States."

This Court further held that it was apparent that the segregation evidenced by one-race schools could not be effectively eliminated in the near future without transporting some students. The Court invited the attention of the team of educators to certain limitations in *Swann* and *Davis* and, pursuant to page 37 of *Davis*, directed the team to propose alternate plans for further desegregation which would be educationally sound and which would achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.

On January 1, 1972, a new nine member Board of Education for the City of Memphis was installed in office. This was a reorganized Board which had been elected in early November 1971, pursuant to an amendment to the state law pertaining to the Board of Education of the Memphis City Schools. It consists of eight persons, including three Negroes, who have never served on the School Board previously, and one person who was a member of the former five member all-white Board.[2]

On January 12, 1972, it was necessary for this Court to enter an order modifying previous orders in the cause. This was necessary because the Associate Commissioner of

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2. One of the elected Negro members of the new Board had served as an advisory member of the former Board.

Equal Educational Opportunities of the United States Office of Education had caused the members of the team, designated to assist the Court and the Board, to discontinue previously offered assistance. In view of the belated and unexpected change in their policy and procedure, the Court concluded that neither the Court nor the Board could rely upon the proffered assistance of the Department of Health, Education and Welfare in carrying out the mandate of the Court of Appeals. The Court, therefore, relieved the members of the team from further participation in the case in their capacities as designees of the Division of Equal Educational Opportunities. The Court directed the defendants to cause to be prepared and filed the alternate plans called for in the Court's Memorandum Decision of December 10, 1971.

The defendants assigned staff personnel of their system to the task of complying with this directive to prepare the alternate plans. On March 3, 1972, these plans designated as "Plan A" and "Plan B" were filed in the cause. On the same date the plantiffs filed a plan of desegregation which they had caused to be prepared.

In its December 10, 1971, ruling, the Court reserved to the defendants the right to file objections to the alternate plans, and further indicated that a hearing would be had on those objections and in the light of plaintiffs' plan.

The Court set the hearing on the respective plans for March 28, 1972. Prior thereto, the defendants filed in the cause three more alternate plans, designated as Plans I, II and III.

In spite of this Court's ruling in its December 10, 1971, opinion based on *Swann* and *Davis* and the Court of Appeals remand opinion, at the recent evidentiary hearing, the defendants contended that the transportation of stu-

dents to desegregate schools is improper and noxious. In their post hearing brief the defendants contend as their first alternate that they be allowed to make the minimal boundary adjustments set forth in Plan I and adopt what they refer to as "The Memphis Plan".[3] The Memphis Plan is primarily a combination of procedures designed to attack the disparity of achievement between students from different socio-economic levels. It also includes the continuation of the existing Cultural Exchange Program, a program whereby certain groups, such as glee clubs, from schools of one race are bused, on a voluntary basis, to schools of the opposite race for visits or performances.

While it is true that Negroes predominate the lower socio-economic levels in this community and Negroes will therefore benefit from remedial education methods, the so-called Memphis Plan is not a desegregation plan.

In support of the Memphis Plan and their position that transportation for desegregation purposes is improper, the defendants rely heavily upon the portion of the Court's May 1, 1970 opinion which read as follows:

> "This serious problem [the disparity of achievement between Negro and white students] has existed for many years and is not peculiar to the Memphis system. The exact causes are not known nor are the cures. This Court concludes from the proof that the solution is not to be found in transporting an undetermined number of Negro or white students to distant parts of the city. The transportation time and money could be more profitably spent by attacking the disparity of

3. The post hearing contention that Plan I is their first alternate suggests a lack of good faith on the part of the defendants, because Plan I fails to incorporate the pairing of Lester-Carpenter, East and Treadwell. This pairing was proposed by the then defendant Board to correct a situation which they had admitted was a vestige of the discriminatory system.

achievement problem in other ways, and no problem should have a higher priority." 312 F. Supp. at 1157.

Insofar as that statement indicated that this Court or the school authorities are allowed to substitute attacking the educational achievement problem for achieving the greatest possible degree desegregation, taking into account the practicalities, the May 1, 1970 statement of this Court was in error.

On June 19, 1970, the Court of Appeals for the Sixth Circuit held that greater, not less, desegregation is the proper manner to alleviate the problem of disparity of achievement. *Monroe* v. *Board of Commissioners, Jackson, Tenn.*, 427 F2d 1005, 1008 (C.A. 6, 1970).

In May, 1970, this Court did not have the benefit of the opinion in *Swann*, particularly with reference to the portion setting forth guidelines concerning one-race schools, construction and location of schools and the transportation of students. In addition, the Court did not have the benefit of *Davis* wherein the Supreme Court remanded that case because, inter alia, the lower courts gave inadequate consideration to the possible use of bus transportation to desegregate the schools in that system. Furthermore, this Court did not have the benefit of *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, wherein, on page 46, the Supreme Court stated that in *Swann* it had noted that "bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it."[4]

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4. Some students in this system have relied upon bus transportation via public transit facilities at their own expense and by being transported to school at the county expense prior to the annexation of certain areas in recent years. Furthermore, as the Court noted on page 11 of its December 10th decision, this system contracted with the county system to transport Negro students, who lived in the Frayser area, to county schools to avoid desegregation after the Frayser area was annexed in 1958.

capacity.[5] Therefore, with regard to capital improvement and maintenance costs the under-capacity schools are creating unnecessary expense under the present system, and the over-capacity schools are interfering with "quality education".

In addition, proof at the recent hearing establishes the fact that in the 1970-71 school year, in the State of Tennessee, 46.47% of all public school pupils in the state required transportation to attend their respective schools.

In *Swann*, on page 12, the Supreme Court noted that the district courts are called upon to act under their equitable jurisdiction in fashioning the proper remedies for a transition from a dual school system to an effectively desegregated system. The Supreme Court again noted, as it had in *Brown* v. *Board of Education*, 349 U.S. 294 (1955), that courts of equity have traditionally applied practical flexibility by shaping remedies which adjust and reconcile public and private needs. The Supreme Court, on pages 12 and 13 of *Swann*, quoted from a portion of its opinion rendered in *Brown* v. *Board of Education*, Ibid, wherein the Court stated, in part:

> "At stake is the personal interest of the plaintiffs [Negroes] in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional princi-

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5. This over capacity condition is being partially remedied by the construction of new schools or additions to existing schools which were not ready for the current school year. For example, additional facilities are under construction to relieve the congestion at all black Hamilton High School at a cost of more than $7,000,000.00. It presently has 3086 students and an optimum capacity of 2500 students and a maximum capacity of 2900 students. It has exceeded its optimum capacity every year since 1964-65.

ples set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

In Section V of *Swann*, on pages 22 to 31, the Supreme Court considered four problem areas pertaining to the central issue of student assignment. Area (1) is entitled "Racial Balances or Racial Quotas". Although the Court approved the limited use of mathematical ratios applied by the district court in the *Swann* case, in doing so the Supreme Court noted that a district court may not require "as a matter of substantive constitutional right, any particular degree of racial balance or mixing" in each school system.[6]

The second area considered in Section V of the *Swann* opinion was entitled "One-race Schools". The Supreme Court noted that the "district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools." However, the Court did note that in some circumstances certain schools may remain all, or largely, of one race until new schools can be provided or neighborhood patterns change. The Court noted that, in this situation, a provision for optional transfer of students in the majority racial group to other schools where they will be in a

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6. This particular degree of racial balance with regard to each school in the system based upon the ratio of the races of the pupils in the system as a whole is to be distinguished from the use of minimum ratios approved for faculty desegregation in *U. S.* v. *Montgomery Board of Education*, 395 U.S. 225 (1969) and for student assignments in *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971).

minority is an indispensable remedy to lessen the impact of the state imposed stigma of segregation. This optional plan must provide free transportation and space in the schools to which the students desire to transfer.

Area (3) was entitled "Remedial Altering of Attendance Zones". In this section of the opinion the Court considered pairing, clustering or grouping of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and the transfer of white students to formerly all-Negro schools. The Court indicated that no "fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits."

The fourth problem area was entitled "Transportation of Students." Although the Court very definitely held that busing is appropriate when the assignment of students to the schools nearest their homes would not produce an effective dismantling of the dual system, the Court indicated that no rigid guidelines as to student transportation can be given for application to the infinite variety of problems. The district courts were directed to weigh the soundness of any transportation plan in the light of what the Court had said in subdivision (1) "Racial Balances or Racial Quotas", (2) "One-race Schools" and (3) "Remedial Altering of Attendance Zones".

It is now incumbent upon this Court to determine how the defendant system might achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation in the light of the various plans offered and the proof pertaining to those plans.

Before considering the respective plans, this Court notes two general areas of practicalities set forth by the

Court of Appeals in its remand opinion. The Court of Appeals said that this case may be distinguished from *Swann* in that extensive busing had been previously provided in connection with the regular operation of the Charlotte Mecklenburg school system. The Court of Appeals also said that the Board in *Swann* had totally defaulted in its duty to submit an acceptable plan of desegregation and had adopted an arbitrary attitude. 444 F2d at 1183.

As the record indicates, this system has never afforded transportation as part of its regular operation. With regard to that portion of the Court of Appeals opinion pertaining to the default on the part of the Board in *Swann* and its arbitrary attitude, this Court noted (page 14 of its Memorandum Decision of December 10, 1971) that the present plan of desegregation, including the location of the schools, has been in some measure sanctioned by this Court and the appellate courts. Therefore, it appears to this Court that whatever method is adopted to correct the present situation must take into account as a practicality the location of the various schools which presently exist. Of course, this practicality does not justify taking only minimal steps to correct a large number of one-race schools presently found in this system.

For the reasons heretofore indicated, the team of educators appointed by the Division of Equal Educational Opportunities of the United States Office of Education were relieved, and the defendants were directed to cause to be prepared the alternate sets of recommendations referred to in the Court's December 10, 1971, Memorandum Decision. The primary responsibility for preparing the recommendations was assigned to Dr. O. Z. Stephens, Director of the Division of Research and Planning of the defendant system. Dr. Stephens was assisted by mem-

bers of his own staff, other personnel from the defendant system and outside consultants, including two of the former members of the team appointed by the Division of Equal Educational Opportunities. The recommendations were filed on March 3, 1972, in a binder entitled "Court Ordered Plan A and Court Ordered Plan B." The document consists of 88 pages, plus appendices A through H and two sets of maps pertaining to both plans.

Plan A was in response to the Court's direction set forth on page 16 of its Memorandum Decision of December 10, 1971, as follows:

> "One set of recommendations shall not have any minimum or maximum percentage factor. It shall be based upon the maximum use of pairing adjacent or nearby schools without transportation, changing zone lines of adjacent or nearby school zones, and closing some schools, plus the minimum use of transportation of students by clustering, pairing, noncontiguous zones, or other methods."

The plan basically makes use of existing attendance zones, and it undertakes to afford significant desegregation by pairing or clustering schools with adjacent or contiguous boundaries. Students who live close enough to these paired or clustered schools are expected to attend by walking or effecting their own transportation. However, wherever the pairing or clustering creates distances in excess of a mile and one-half, or unusual problems occur, the students will be transported by the defendant system. The plan also makes some boundary changes. It rearranges some grade organizations of elementary and junior high schools. It reduces the need for additional capital improvements projects through the utilization of excess classroom space in certain areas of the city.

The pupil population in each zone was determined by adjusting the current enrollment figures by subtracting the number of students in that school on a transfer from another school zone and adding the number of students out of the attendance zone on transfer to another school.[7] Under Plan A it is estimated that transportation of 13,789 pupils will be required. This represents less than 10% of the current pupil enrollment which will be somewhat increased by the addition of more schools for the coming year through annexation.

The study of the pupil population figures also disclosed that there are five schools that definitely can be closed. Those schools with the dates when they were built are as follows: Merrill, 1890, Wisconsin, 1901, Lennox, 1909, Pine Hill, 1918, Weaver (Frame construction) 1918. In addition the plan suggests options whereby two additional schools may definitely be closed. Those are Maury, built in 1908, and Oakville, built in 1922. Furthermore, the study discloses that by rearrangement of certain zones in the Idlewild and Rozelle area, the defendant definitely will be relieved of the construction of another school in Glenview Park, which it had planned and sought approval from the Court to construct. Other closings, or partial closings, are also available in Plans A and B. However, these closings and partial closings are based on the continued use of the facilities for such things as special education, different grade levels and research

7. The method used for determining the pupil population is not as accurate as a pupil locator map. In this regard the Court is not unmindful of the comment of the Court of Appeals on page 1182 of its remand opinion that a pupil locator map would be beneficial. Soon after the remand, the team of educators and defendant staff personnel investigated the problems of preparing a pupil locator map. Based on their report, it was agreed that such map was not feasible from the standpoint of the time it would require to prepare it.

projects. The economy that will result from this has not been computed but obviously it will be considerable now and in the future.

Plan B was the result of the alternate direction of the Court set forth on page 16 of its Memorandum Decision of December 10, 1971, wherein the Court stated as follows:

> "The other set of recommendations shall be based upon an attempt to desegregate all schools necessary to the maintenance of the system so that no school will have a minority race of less than 30%. This set of recommendations shall not be based entirely on busing. It, too, should make use of other desegregation methods before transportation is to be used."

The 30% minority race provision was adopted by the Court in an effort to establish minority situations which would avoid the current isolation of small minorities in a large number of schools. The provision was not absolute, and the Court noted that there were limitations set forth in *Swann* and *Davis* whereby certain schools may not be established with 30% minority attendance figures. Under Plan B as proposed, many of the schools would not meet the 30% minimum. Twenty-three would still have minorities of less than 10%. H. E. 47.

Plan B superimposes a series of pairings and some boundary adjustments on top of Plan A. All of the elementary schools not paired in Plan A are paired in Plan B except schools in 13 of the zones. All junior high schools not paired in Plan A are paired in Plan B. Plan B is the same as Plan A with regard to the high schools. However, because all of the junior high schools are paired in Plan B, there would be additional desegregation in those

facilities which have junior high and high schools at the same location.

Estimates set forth in the report to the Court filed March 15, 1972, indicate that under Plan B 39,085 students would be transported by buses. Since Plan B is superimposed on Plan A and the pairings are of noncontiguous schools, great distances are involved in the pairings. There are pairings of schools in 22 instances where the distance from the farthest residential area in one school zone to the receiving school is in excess of ten miles, and there are 10 instances where the estimated adjusted driving time in minutes from the residential area in one school zone to the receiving school exceeds 40 minutes. The adjusted driving time is based upon test drives in accordance with the criteria in Hearing Exhibit 6, plus five minutes.

The Plaintiffs' Plan was prepared by Dr. Gordon Foster, Professor of Education at the University of Miami and the Director of the Florida School Desegregation Consulting Center. Under this plan the system was divided into four geographical zones, primarily based upon the existing elementary school zones. The elementary schools in each zone were paired after taking into consideration the capacities of the respective schools and the race of the students in the existing zones. Junior high school attendance figures were based upon leaving all junior highs as seventh through ninth grade units with the students coming from the elementary schools on a feeder basis. By the same token, the high school pupils would be assigned to schools consisting of tenth through twelfth grade units on a feeder basis from the junior high schools. The attendance figures for the junior high and the high schools were based upon formulae which took into consideration, by race, the number of students in the respec-

tive units compared to the number of students in the system as a whole. Under this plan it is estimated that approximately 61,530 students would be transported.

Although Dr. Foster has heretofore investigated the Memphis School System as an expert witness in prior hearings, his actual knowledge of the community is considerably limited. In his testimony, Dr. Foster indicated that his plan contemplated that local officials of the defendant system would make adjustments to compensate for the inaccuracies due to his lack of familiarity with the community, the formulae used for the junior and high school attendance figures, and any other inaccuracies.

The plan concludes with a condition which reads as follows:

> "If such a plan is to work effectively the entire City of Memphis would have to be dedicated to this end. Students, parents, faculties, administrators and the entire community will all have to make their contribution to a long range integration program." Page 45-46 Plaintiffs' Plan.

As heretofore indicated, shortly before the recent evidentiary hearing, the incumbent Board filed three alternate plans designated as I, II and III. Plans I and II are in furtherance of the position of a majority of the defendant Board wherein they contend that the transportation of students is not a proper method of desegregation. Plan I consists of a small number of boundary changes. In his testimony, Dr. Stephens indicated that little could be done with this method because prior efforts of the defendants by means of boundary changes had accomplished about as much as could be done. Plan II is based upon boundary changes and some pairing and clustering but with no transportation. Plan III is the same as Plan A but the

transportation is limited to elementary schools. At the hearing very little was said about Plan III because the Board took the position that all transportation was improper, and the plaintiffs contended for their plan.

The projected cost estimates of transportation submitted by the parties and the proof pertaining to the costs of the respective plans show wide variations and some discrepancies.

The defendants have estimated the annual operating costs for transporting 13,789 students under Plan A to be $629,192, with an initial capital cost of $1,664,192, under a school operated plan. Estimates for the same number of pupils under a contract plan, with the contractor owning and operating the buses, are $744,330 annually. These estimates are based upon four trips per bus to and from the respective schools. The costs are also based upon maximum loads at the seated capacity of each vehicle. In the case of the school operated plan the estimates were based upon an annual pupil cost of $45.63 which was obtained from average costs per pupil in the State of Tennessee.

Under Plan B the defendants estimate that the cost of transporting the 39,085 students will be $1,783,490 annually, with an initial capital cost of $3,924,000, based upon a school operated plan. The same criteria were used for Plan B under the school operated plan as those used in the estimates for Plan A, except the number of trips per bus was estimated at three instead of four.

Plaintiffs have submitted annual operating costs of $2,354,220, $2,431,212 or $3,468,100 for transporting the estimated 61,530 students. These respective costs depend upon whether the Board buys its own buses and, if so, whether diesel or gasoline buses are used or as a third

alternative, whether the buses are provided by contract carriers. The plaintiffs' figures pertaining to Board-owned buses do not include the original capital outlay for the purchase of the buses; however, the figures do include a depreciation figure based upon seven years. All estimates are based upon three trips per bus with each bus transporting its rated capacity plus a 10% overload. The costs were based also upon a Michigan formula using wages and depreciation as 63% of the total cost.

In addition to these cost estimates, the plaintiffs offered proof in the form of schedules of the existing Memphis Transit Authority public routes. Most of these routes go near the schools; however, no proof was offered to show how many students would be expected to ride which existing public transit buses and at what times. Therefore, the Court cannot make any finding that this means of transportation is a practical method of implementing the plaintiff's plan of desegregation.[8]

It appears to the Court that all of the estimates are lower than the actual costs will be. Proof was offered pertaining to the average annual cost of transportation in different localities. That proof indicates that there are wide variations, which suggests to the Court that local arrangements and conditions affect the average annual cost. It must be remembered that this system has no prior experience with the use of regular pupil transportation.

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8. The proof reflects an anomalous situation in Memphis, in that the publicly owned transit authority is suffering a financial crisis due to an insufficient number of riders, whereas, the publicly owned school system contends it cannot transport pupils because it has no buses for them to ride. However, having a substantial number of students transported on transit authority vehicles is a problem which cannot be solved without cooperatively resolving the problems arising from the fact that the times when students are going to and from school are the times of peak demand by regular transit patrons.

From the proof it appears that all funds needed to pay the costs of transportation will have to come from funds already appropriated or to be appropriated by the city government. The state law and regulations pertaining to a partial reimbursement of transportation costs incurred by the counties do not recognize as a matter of right city boards of education as participants in the common fund appropriated by the state legislature. In the past, when bus transportation has been used by this defendant Board for limited purposes, the Shelby County Board of Education, by informal agreement with the City Board of Education, has included a claim for transportation reimbursement for the city in the county's claim. However, a regular and substantial claim by this type agreement would diminish the per pupil reimbursement for Shelby County and possibly other counties in Tennessee. Because the law does not permit city governments to participate in this fund as a matter of right, it is not probable that the Shelby County Board of Education will be willing to continue the practice and thereby diminish its funds.

This problem is further complicated by strained relations between the Shelby County and the City of Memphis Boards of Education, which have arisen over a dispute, and possible lawsuit, concerning the amount of money that the city board should pay the county board for the schools built by the county prior to recent annexations by the City of Memphis.

Upon consideration of all the plans, the proof offered at the hearing and the entire record in the cause, this Court is of the opinion that Plan A, with certain modifications, meets the criteria established and required by the Constitution of the United States as interpreted by the authorities. The practicalities of the existing situ-

ation in the City of Memphis limit the change in the plan of desegregation to this extent at the present time. Plan A will afford the defendant Board an opportunity to implement a system of transportation for its students, and thereby afford the defendants with an opportunity to observe the best ways and means for implementing further desegregation in the future. Plan A further meets the test of practicalities with regard to time of implementation and costs in the light of the circumstances existing at this time.

An option set forth in Plan A pertains to Maury Elementary School. This school was built in 1908. At the present time it has a student enrollment of 133 white students and 62 Negro students in a facility that has an optimum capacity for 520 students. Plan A, as originally proposed, calls for closing Merrill School and Maury School and assigning the pupils from those respective zones to Carnes School, which is located between the existing Merrill and Maury zones. The projected enrollment after the three schools are consolidated would be 1235 students, 1056 of them would be black and 179 would be white. The total combined enrollment for Carnes School would be well within the optimum capacity of 1400.

The option proposes that Maury not be closed and that it be operated as a separate zone. The Maury zone is adjacent to the zones of other schools in the center of the city which caused the Court to comment in its December 10, 1971, opinion to the effect that consideration should be given to trying to preserve those neighborhoods that have accommodated natural desegregation. If Maury School is maintained as a separate unit it will be operated as a school that is approximately 65% vacant in its use. For that reason, the Court believes that the op-

tion should be rejected and that Maury should be consolidated into the Carnes zone.

Another proposed option to Plan A pertains to a clustering in the southeast part of the city. This optional clustering plan consisting of Goodlet, Willow Oaks and Knight Road schools, is hereby approved. By the adoption of this option the defendants will close Oakville Elementary School and will be permitted to continue a long range study and survey in Sheffield School. The option proposed for pairing Lester-East and Treadwell is also approved.

Prior to the November hearing the Court allowed certain petitioners to intervene as amicus curiae in this cause. The intervenors are a nonprofit organization, "Vollentine-Evergreen Community Action Association, Inc." (VECCA), and individuals who sued as next friends for certain minors. The petition asserted that VECCA is an organization committed to promoting and maintaining a stable, racially integrated residential neighborhood in an area in north central Memphis. The approximate boundaries of VECCA are North Parkway on the south, Trezevant on the east, Brown on the north, and North Watkins on the west. Petitioners intervened in behalf of white high school students who, according to the petitioners, are being deprived of their constitutional rights to attend integrated schools.

The individual intervenors, who live in part of the geographical area of VECCA, are assigned to the Northside High School zone. It is alleged that under the existing plan of desegregation of the defendants, the intervenors, as minority whites, are forbidden to transfer to a school where they would be in a truly integrated situation. It is further contended that Northside, with less

than 2% white population, is not an integrated school within the meaning of the constitution. One of the officers of VECCA testified as a witness for the plaintiffs in the November hearing, and his testimony did establish that the members of the organization are undertaking to promote neighborhood racial harmony in the VECCA area of the city.

Plans A and B enlarge the Northside zone by incorporating a portion of the Douglass High School zone. Douglass presently is over its optimum capacity and is an all-Negro school. On the other hand, Northside, one of the newer high schools in the system, presently has 1444 students with an optimum capacity of 1700.

At the recent hearing the Court inquired of Dr. O. Z. Stephens, if consideration had been given to placing the remainder of the VECCA area in the Central High zone. This was upon the theory that all of VECCA was included within the area that had accommodated desegregated schools and withstood the problem of changing the neighborhood racial makeup. Dr. Stephens indicated that consideration had not been given to that theory, but staff personnel would supply the Court with information pertaining to the number of students living in that area. After the hearing, information was supplied, and the Court has given further consideration to this possibility.

The information available to the defendant system and the Court is difficult to interpret because a portion of the VECCA area is presently in the Central High zone, and a relatively large number of white students from the area attend Central. When the boundaries of the VECCA area are examined on the map, it shows that to transfer the rest of that area to the Central High zone would require gerrymandering a sizable portion of the proposed

Northside zone. The corner of the gerrymandered portion would be within four blocks of Northside School. It should also be noted that Plan A contemplates a change of the Central zone to the south which incorporates a portion of the former Hamilton zone. Upon consideration, the Court has concluded that it should not alter the Northside zone.

The problem of isolated minority students of both races is a serious one for the defendant Board and the Court. Because of the holdings in *Green*, *Raney* and *Monroe*, *supra*, the former freedom of transfer plan of the defendants was found to be unconstitutional. This caused the Court to conclude that minority transfers should be discontinued in an effort to promote further desegregation. However, experience has shown that this method is not truly effective for desegregating most of the schools. On the other hand, after carefully examining the respective plans, the Court has concluded that it is not practical to provide the city-wide transportation necessary to relieve the problem of isolated minorities. Until the Court is presented a plan within the practicalities of the situation, the Court knows of no solution to relieve this problem for the many students who find themselves in these isolated minority situations.

Because Plan A is based upon adjusted enrollment figures, all school zones which are paired or clustered, have boundary changes, or are otherwise changed by Plan A will have no transfers from those zones except for children of employees of the defendant Board, special education transfers and adjustment transfers. Schools in the system which are not changed by the implementation of Plan A as modified will have transfers for children of employees of the defendant Board, minority to minority transfers at the students' own expense, majority to mi-

nority transfers at the expense of the defendant Board on public transportation facilities, adjustment transfers, and special education transfers. All adjustment transfers shall be limited to situations where there has been a disciplinary or psychological problem for the student who is to be transferred. No adjustment transfers may be granted to a student where he will be transferred from a school where he is in the minority race to a school where he is in the majority race. Special education transfers shall be limited to those students having a physical or mental handicap. Transfers for employees of the defendant Board shall be limited to a transfer from the zone of the pupil's residence to the school where the employee is regularly assigned.

Future site acquisitions and future construction shall continue to be subject to court approval after notice to counsel for the plaintiffs as presently required, with the additional proviso that future site acquisitions and construction shall take into consideration the possible use of transportation of students.

Plan A as modified and all other modifications of the existing plan shall be implemented commencing with the beginning of the school year 1972-73.

At the recent hearing, the defendants offered proof through Lee Thompson, Assistant Superintendent, Department of Personnel Services of the defendant system, to the effect that the pairing of schools will cause problems concerning faculty transfers, particularly in the light of the present court required minimum and maximum ratios of Negro and white teachers. Through the testimony of Mr. Thompson, the defendants requested that his staff and representatives of the teachers association be allowed to confer and propose a plan for the necessary teacher

transfers, and that they be allowed to consider variations from the present minimum-maximum ratios. In the event that temporary variations from the present plan of teacher desegregation are thought to be necessary in the implementation of Plan A by the fall of 1972, counsel for the defendants may file with the Court a list of necessary variations for the consideration of the Court.

In this case the Court has been faced with extreme opposite positions taken by the respective parties. On the one hand, it appears to the Court that the defendants have failed to recognize and acknowledge the interpretations of the Constitution which impose upon the defendants the duty to make every effort to achieve the greatest possible degree of actual desegregation. It further appears that the defendants have over-emphasized solvable problems as "practicalities" which justify the continued operation of an effectively segregated system. On the other hand, it appears to the Court that the plaintiffs have over-emphasized the guidelines of constitutional law, while failing to take into account the practicalities of the situation. Therefore, the Court has been called upon to exercise its equity jurisdiction in favor of a plan between the two extremes. The Court earnestly believes that the approved plan meets the requirements of the Constitution. The Court feverently hopes that this will afford the defendants a means of ultimately achieving the goal of a desegragated school system in practice—not merely in principle.

This 20th day of April, 1972.

/s/ Robert M. McRae
United States District Judge

APPENDIX C

Nos. 72-1630 and 72-1631

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 72-1630

DEBORAH A. NORTHCROSS, ET AL.,
Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, ET AL.,
Defendants-Appellants.

No. 72-1631

DEBORAH A. NORTHCROSS, ET AL.,
Plaintiffs-Cross-Appellants,

v.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, ET AL.,
Defendants-Cross-Appellees.

On Appeal from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed August 29, 1972.

Before: WEICK, CELEBREZZE and PECK, Circuit Judges.

CELEBREZZE, Circuit Judge. These appeals represent another installment of an already lengthy serial: "The

Desegregation of the Memphis Public School System." The initial chapter of this story was written in 1960 when Plaintiffs first sought to apply the principles of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) [*Brown I*] and 349 U.S. 294 (1955) [*Brown II*] to Memphis' *de jure* segregated school system. Since that time various aspects of this desegregation suit have been before the United States District Court for the Western District of Tennessee, this Court and the United States Supreme Court.

Most recently, pursuant to our remand (444 F.2d 1179 (1971)) the District Court has reconsidered its previously adopted desegregation plans in light of the principles announced by the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and its companion cases: *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971); *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971); *McDaniel* v. *Barresi*, 402 U.S. 39 (1971); *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971). As a result of this reassessment the District Court determined that more intensified desegregation efforts were required in Memphis. In April, 1972, after holding extensive hearings, the District Court ordered into effect a new plan which would, for the first time in the history of this suit, require the transportation of children as part of an effort to eliminate "root and branch" the vestiges of the dual school system in Memphis. The plan is to be operational by the start of the 1972-73 school year.

Both defendants and plaintiffs have appealed from this latest order of the District Court. This Court granted a stay of that order pending our decision in the cases. Mindful of the need for speedy implementation of ap-

propriate desegregation orders,[1] however, we also granted expedited hearings in connection with such appeals. *Northcross* v. *Board of Education of Memphis City Schools* (6th Cir., Misc. No. 1576, decided June 2, 1972; rehearing en banc denied, July 5, 1972.)

In its appeal, the defendant school board asserts that it has achieved the constitutionally required unitary school system or will shortly attain such unitary system as a result of minor changes to be effected in its student assignment plans. The School Board therefore asserts that the new plan adopted by the District Court in April, for September, 1972 implementation, imposes an unnecessary burden upon it and the school children within its system. It also contends that the busing ordered by the District Court "is wrong" because such busing is harmful to the interests which the Board asserts *Brown I* and *Brown II* sought to further.

In *their* appeal from the District Court's order the plaintiffs complain that the new plan adopted by the District Court does not meet the requirement of *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 439 (1968), that any desegregation plan adopted be one which "promises realistically to work, *now*." (emphasis in the original).

The Memphis school system is one of the largest in the nation. When this suit was begun in 1960 the schools of the system were segregated by law despite the Supreme Court's rulings in *Brown I* and *Brown II*, handed down years earlier. As a result of decisions handed down by the federal courts in connection with this suit the School Board

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1. See *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 226 (1969); cf. *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 438-39, 442 (1968).

adopted several plans for the desegregation of the Memphis schools in the period subsequent to 1960. The effectiveness of these plans can be gauged by a quick look at the "vital statistics" of the Memphis system as it now exists.

In the 1971-72 school year some 145,581 students attended classes within the school district. Of these children 53.6% were black and 46.4% were white. The School Board operated 162 schools in that year. In 128 of these schools, students of one race comprised 90% or more of the schools' total enrollment, despite the near equality in the number of black and white children in the system as a whole. 47 schools (29% of the total) had student populations which were *entirely* black or white.

The present racial distribution has been the result of an assignment plan essentially based on geographic zoning and the "neighborhood school" concept. Such assignment plan became fully operational in 1966 when overt assignment by race was finally abandoned with respect to all grades. The attendance zones have been modified several times since 1964 by court order in an effort to increase the degree of integration which could be achieved within the system. During this past year minority to majority transfers within the system were prohibited.

It is the defendant School Board's contention that notwithstanding the fact that some 79% of its schools have an essentially monolithic racial structure it has satisfactorily cured the violation of law involved in its past *de jure* segregation and has, in fact, established a unitary system. We cannot accept this contention.

As recently as 1970 the Supreme Court affirmed the District Court in its finding that Memphis was not a unitary school system. *Northcross* v. *Board of Education of the Memphis City Schools*, 397 U.S. 232, 235 (1970). While

additional faculty integration has occurred since the date of that decision the continued pattern of racial separation with respect to student assignment convinces us, as it did the District Court, that the dual system has not yet been eliminated in Memphis.

We recognize, of course, the Supreme Court's caution that the existence of "some *small* number of one-race or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971). We cannot believe that this language,—obviously designed to ensure that tolerances are allowed for practical problems of desegregation where an otherwise effective plan for dismantlement of the dual system has been adopted—was intended to blind the courts to the simple reality that a formerly *de jure* segregated system has not dismantled its dual system when 87% of its black students still attend one-race schools.

Even were we to assume that the existence of the large number of one-race schools in this case is not a *per se* indication that the Memphis Board has failed to eliminate its dual system, there is still a presumption that such is the case under *Swann*, 402 U.S. 1, 26. To overcome this presumption according to the Supreme Court, the School Board would have to demonstrate that at the very least its remaining one-race schools are not in any way the product of its past or present discriminatory conduct. It is clear that the School Board has not met that burden in this case.

The Board maintains that the present one-race schools are attributable to the pattern of residential segregation within the Memphis area. Evidence taken at a 1971 hearing held with regard to this matter demonstrated, however, that through a pattern of school location decisions, selective

construction and systematic over and under utilization of school buildings the racially neutral geographic zone assignments formulated with court approval have been undermined and made to serve the cause of continued segregation in Memphis. The District Court found that such conduct by the School Board, continuing up until the time of the 1971 hearing itself had contributed "to the establishment of the present large number of one race schools. . . ." Our independent review of the evidence leads us to conclude that the District Court's findings were not clearly erroneous, and in fact, represent an accurate and realistic view of the factors responsible for the present racial pattern in the Memphis City schools.

It is thus clear that far from having achieved a unitary school system the Board has helped to perpetuate the old dual system.[2] Under these circumstances there can be no doubt that the District Court was under an obligation to order the adoption of a plan providing for further desegregation. Since many of the one-race schools are clearly the result of discriminatory actions of the School Board there can be no doubt that under any interpretation of *Swann* the elimination of such schools must be one of the objectives of any appropriate desegregation plan.

In adopting such plan the District Court was not bound to employ a system which merely would be racially neutral in operation. "The objective is to dismantle the dual system:" *Swann*, 402 U.S. 1, 28 and "The measure of any desegregation plan is its effectiveness." *Davis* v. *School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971). Given such a measure:

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2. We, like the Supreme Court in *Swann*, find no need to consider the relevance of discriminatory actions by other state agencies insofar as they may have affected the pattern of student assignment in the public schools. See 402 U.S. at 22-23.

> "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board" affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral. *Swann, supra* 402 U.S. at 28.

Recognizing the applicability of these comments to the Memphis situation the District Court went beyond the mere gesture of requiring that future construction, location and utilization decisions be truly neutral. It required affirmative action including pairing, the alteration of some zone lines and the transportation of school children to counter the observed—and the unobservable—results of past School Board enforced segregation.

The School Board does not contest the fact that any further substantial desegregation cannot be accomplished without the transportation of school children; nor, as discussed in the preceding paragraphs is there any reason to believe that such further desegregation is not required. Nevertheless the School Board opposes the use of busing in this case. Its position is simple; the use of compulsory busing for desegregation purposes is unwise and counterproductive. In short, the School Board argues, busing for the purposes of desegregation "is wrong."[3]

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3. Defendants-Appellees' reply brief in No. 72-1631 at p. 2.

The Supreme Court has, of course, come to the opposite conclusion in a recent unanimous decision, holding that "bus transportation" is one "tool of desegregation" which school authorities may be required to use. *Swann, supra*, 402 U.S. 1, 30." Recognizing this to be the holding of *Swann*, Defendants nevertheless suggest that we come to a contrary conclusion on the basis of a single piece of much criticized sociological research,[4] the conclusions of which are, by its own terms, inapplicable to the Southern school pattern.[5] It would be presumptuous in the extreme for us to refuse to follow a Supreme Court decision on the basis of such meager evidence. *Swann* is controlling and requires us to sanction the use of bus transportation as a tool of desegregation when, as here, such busing is necessary to accomplish the dismantling of the dual system and its use does not pose intolerable practical problems.

With respect to this latter point we note that the most serious practical problem which busing commonly presents —that of requiring children to spend an excessive amount of time on the buses—is not a factor in this case. Under the plan adopted by the District Court the maximum time to be spent on the buses by any child is 34 minutes—slightly less than the maximum time involved in the *Swann* case and there found acceptable. See 402 U.S. at 30.

The only other practical problem which has been raised by the School Board is its lack of familiarity with the administration of a transportation program. It is true that while the Board has used buses in recently annexed areas pending the construction of new schools, it has not

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4. Armor, "The Evidence on Busing", The Public Interest, p. 91 (Summer, 1972). The publication plans to print the scholarly critiques of the article in its next issue, according to the preface to the piece.

5. *Armor, supra* n. 3 at 123.

used them on a regular basis within the school system proper. This lack of experience, while perhaps a factor of marginal significance to be considered in creating a timetable for implementation of any busing program surely cannot be allowed to bar entirely the use of such program where busing is the only effective means of accomplishing the Constitutionally required job of desegregation.

Under the circumstances of this case we believe Defendants' objections to the implementation of the plan adopted by the District Court are without merit.

Plaintiffs too have objected to the District Court's overall decision, however. They assert that the District Court erred in rejecting plans which could have provided for more desegregation faster. Plaintiffs point out that the present plan will still leave 80 of Defendant's 162 schools in the one-race status at the close of the '72-73 school year. They contest the accuracy of the District Court's finding that the more effective plans submitted to it would prove impractical. At the same time Plaintiffs raise these objections, however, they acknowledge that at this late date no more effective desegregation plan could be implemented for the beginning of the 1972-73 school year. Since they also recognize that the District Judge accepted the need for further desegregation in the future they request only that this Court direct the District Court to prepare a timetable for further desegregation. We believe such request is reasonable. It will allow the implementation of the present plan unimpeded by procedural wrangles, while providing an opportunity for the District Court to arrive at a final plan which is effective, "feasible and pedagogically sound." *See Robinson* v. *Shelby County Board of Education*, 442 F.2d 255, 258 (6th Cir. 1971). (Opinion of McCree, Judge.)

Accordingly we affirm the order of the District Court in its entirety, but with the additional instruction that it prepare a definite timetable providing for the establishment of a fully unitary school system in the minimum time required to devise and implement the necessary desegregation plan.

Upon entry of this decision the stay heretofore granted by this Court shall be dissolved and the order of the District Court implemented forthwith.

WEICK, Circuit Judge, dissenting. The order of the District Court which the Court has just affirmed requires the daily busing of about 14,000 school children, but this is just the prelude to a great, massive busing program, for which the Court directs the District Court to "prepare a definite timetable providing for the establishment of a fully unitary school system in the minimum time required to devise and implement the necessary desegregation plan."[1]

The District Court has characterized the plan providing for the busing of 14,000 children as "minimal." Indeed it is minimal when compared with an alternate plan under consideration by that Court, which alternate plan provides for the busing of 39,085 children, and plaintiffs' plan which they are urging the Court to adopt, providing for the busing of 61,530 children.

The cost of all of this program will run into millions of dollars, not only for the buses but also millions of dollars annually to operate them. The Court does not determine where all of the money is to come from, or whether it is

1. Although it has never been very clear just what comprises a unitary school system, the plans are obviously seeking a proportionate racial mixture in each and every school in the city irrespective of the location of the children's residences.

practical or feasible. It is assumed that this burden will be thrust upon the Memphis taxpayers.

Nor do we know what effect the massive busing programs will have on the educational programs now in existence, on the educational achievement of the children who attend public schools, or on the constitutional rights of the children (if they have any) of both races who do not want to be assigned away from the neighborhood schools where they are attending, which assignments are made solely because of the color of their skin, and by which assignments the children will be bused to strange and unfamiliar surroundings in order to achieve a racial quota or mixture in each and every school in Memphis.

Immediately upon the filing of the appeal, plaintiffs moved that the appeal be expedited. We granted the motion and assigned the appeal for oral argument on July 15, 1972, during our summer recess. It now appears that this is a piecemeal appeal, or an appeal from an interim order, and that the massive busing orders which are being requested are not supposed to become effective until the 1973-74 school year. We stayed the order of the District Court pending appeal.[2]

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2. The stay was granted by a panel of this Court to permit consideration of substantial issues before enforcement of the District Court's judgment requiring the expenditure of large sums of public funds required even to initiate a program to furnish transportation by bus to children in the public schools in a city which previously had not furnished such transportation and which transportation was claimed by the Board to be for the purpose of achieving racial balance in the schools. Twice, all the active Judges of this Court were requested to vote on whether an en banc hearing should be held on the revocation of the stay, and each time a majority of the Judges voted "No". A dissent was filed to the refusal to grant the second request for an en banc hearing, stating among other things that the Supreme Court "told" District Judges and Appellate Judges not to grant stays in school desegregation cases. The panel granting the stay was unable to find any such decision of the Supreme Court.

The history of the case and the developments in the law appear in the reported decisions of this Court in *Northcross* v. *Board of Educ.*, 302 F.2d 618 (6th Cir. 1962); 333 F.2d 661 (6th Cir. 1964); 397 U.S. 232 (1969), and 444 F.2d 1179 (6th Cir. 1971). Since adoption of the desegregation plan no student has been excluded from any school because of race or color, except in compliance with a transfer plan ordered by the Court.

Upon the last remand of the case by this Court for reconsideration in the light of *Swann* v. *Board of Educ.*, 402 U.S. 1 (1971), and related cases, the District Court conducted an evidentiary hearing and filed the two opinions which are the subject of review in the present appeals.

In the December 10th opinion of the District Court, the school system is described as follows:

> "During the current school year (1971-72), the defendant system is based upon a curriculum arrangement of elementary schools of grades 1 through 6, junior high school of grades 7 through 9 and high schools of grades 10 through 12. There are 145,581 pupils, 53.6% of them are black and 46.4% of them are non-black (hereinafter referred to as white). Percentagewise, 87.7% of the blacks are in 90% or more black schools and 76.4% of the whites are in 90% or more white schools. There are 162 schools, 67 of them are 90% or more black and 61 of them are 90% or more white (29 are all black and 18 are all white). Percentagewise, 37.6% of the 162 schools are 90% or more white and 41.3% are 90% or more black.
>
> "Pursuant to previous orders of this Court the present pupil assignment phase of the defendant system's desegregation plan is basically a geographic zone plan with minority to majority transfers prohibited.

"The proof unquestionably establishes that the one-race schools do follow racial housing patterns."

Substantial evidence was offered tending to prove that these racial housing patterns were not peculiar to Memphis, but that such housing patterns existed in other cities throughout the country, irrespective of the type of school system in operation (whether de jure or otherwise). This was testified to by Dr. Robert Guthrie. In his book on "Negroes In Cities", Dr. Karl Taeuber states that residential segregation exists "regardless of the character of local laws and policies and regardless of other forms of discrimination." He said substantially the same thing in his article, "Residential Segregation", in the August, 1965 issue of *Scientific American*:

"No elaborate analysis is necessary to conclude from these figures that a high degree of residential segregation based on race is a universal characteristic of American cities. This segregation is found in the cities of the North and West as well as of the South; in large cities as well as small; in nonindustrial cities as well as industrial; in cities with hundreds of thousands of Negro residents as well as those with only a few thousand; and in cities that are progressive in their employment practices and civil rights policies as well as those that are not." (Ex. 81, Page 14).

It seems to us that this evidence ought to carry great weight on the important issue as to whether the Board was responsible for the creation or maintenance of the residential patterns of the city and whether the entire burden for the integration of the races should be placed upon the public school system and the school children.

In *Bradley* v. *School Board of City of Richmond*, ... F.2d ..... (4th Cir., No. ....., decided June 5, 1972), the Court said:

> ". . . [T]he root causes of the concentration of blacks in the inner city are simply not known . . . ."

and

> "Whatever the basic causes, it has not been school assignments, and school assignments cannot reverse the trend."

Since 1960 the Board of Education has spent an average of $10,000,000 per year on school construction. Some schools have vacant spaces, whereas others are over-filled with students. This condition can easily be remedied. It had been the established practice of the Memphis Board of Education and of other Boards of Education throughout the County to locate schools in areas of the residences to be served. The neighborhood school system has existed throughout America and its value only recently has been the subject of bitter attack in desegregation cases. The District Court now requires court approval of any new school construction.

I disagree with the District Court that the accommodation of the Board to the housing patterns made it or its predecessors an active partner in discrimination. The record shows that on occasions the Board interceded with housing authorities in an effort to persuade them to locate structures so as either to approximate integration or retard segregation. There has been mobility of both white and black families which the Board cannot very well control.

Three plans were considered by the District Court. Plan A, which the Court adopted, provides maximum use of pairing of adjacent or near by schools without transportation of students, changing some zone lines of adjacent or near by schools, closing some schools, plus the

minimum use of transportation of students by clustering or pairing non-contiguous zones, or other methods.

The transportation, which the Court characterizes as minimum, provides for busing of about 14,000 pupils, just as a starter. Memphis does not have a history of transportation of students. The Board estimates this will require a capital expenditure of $1,664,192 for buses, plus an annual operating cost of $629,192. It had an estimate of $744,330, annually, from one contractor. The annual cost of transportation would be about fifty dollars per pupil. The Court was of the view that adoption of Plan A would provide the Board "with an opportunity to observe the best ways and means for implementing further desegregation in the future."

Plan B was ordered by the Court as an alternate, to desegregate *all* schools necessary so that "no school will have a minority race of less than 30%." It would require the busing of 39,085 pupils, at a cost of $1,783,490, annually, or a total initial investment as estimated by the Board in the amount of $3,924,000. This, of course, is the "quota" system.

Plaintiff submitted a proposed plan prepared by their expert, Dr. Gordon Foster, which plan would require minority races to be present in each and every public school in the system, regardless of where the children live. It would require the daily busing of 61,530 pupils. Plaintiffs have submitted estimated operating costs of $2,354,220, $2,431,710, or $3,463,100, depending on whether the Board buys its own buses, and if so, whether diesel or gasoline buses are used, and whether the buses are provided by contract carriers.

Memphis has a large concentration of black population in the inner city, with smaller numbers on the out-

skirts. The only way these residential patterns can ever be dismantled is by forced or induced busing of black and white children away from their neighborhood schools to other schools located some distance therefrom. It is claimed that all of this is necessary in order to achieve integration of the races in the public schools.

But what about the black and white children who do not want to be bused away from their neighborhood schools? Do they have no constitutional rights? It would appear that this issue has been given scant consideration by the Courts. Yet, merely because a child's skin is white or black, he is on that account, and without his consent or that of his parents, assigned to a particular school, and bused away from his neighborhood school in order to achieve a mixture of the races in each school in the city. I submit that the Constitution requires no such thing.

It is not claimed that these unfortunate children, who are the victims of induced busing, have committed any offense. And we are living in a free society in which one of the privileges is the right of association.

The average American couple who are raising their children, scrape and save money to buy a home in a nice residential neighborhood, near a public school. One can imagine their frustration when they find their plans have been destroyed by the judgment of a federal court.

The elimination of neighborhood schools necessarily interferes with the interest in and participation by parents in the operation of the schools through parent-teachers' associations, interferes with activities of children out of school, and interferes with their privilege of association, and it deprives them of walk in schools. It can even lower the quality of education. "School Desegre-

gation After Swann," Univ. of Chicago Law Review, Vol. 39 No. 2, Winter 1972, p. 444.

In *Brown II*, the Court said:

> "The opinions . . . declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein . . . ." (349 U.S. 294, 298 (1955)).

The effects of prior discriminatory practices can hardly be deemed to exist when children are permitted to select the schools they desire to attend and are furnished free transportation to that school at public expense.

In *Alexander* the Court required:

> ". . . unitary school systems within which *no person* is to be effectively excluded from *any* school because of race or color." *Alexander* v. *Holmes Co. Bd. Educ.*, 396 U.S. 19, 20 (1969). (Emphasis added).

In Memphis today no person is excluded from any school because of race or color.

However, it is contended that discrimination of individuals and of public and private agencies either caused or contributed to cause the concentration of black population in the inner city. The fact should not be overlooked that socio-economic conditions were involved, importantly and principally, in the concentration. The burden of elimination of all of the ills of society should not, in all fairness, be visited upon the public school systems and upon innocent school children who are not responsible for these conditions and who are not represented and cannot protect themselves. Nor should the children be used as pawns.

As Chief Justice Burger well stated in *Swann*:

> "The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage." (*Swann* v. *Board of Educ.*, 402 U.S. 1, 22 (1971)).

In remedying discrimination against the plaintiffs, we ought not to discriminate against other innocent children whose constitutional rights, with those of the plaintiffs, are equal.

Boards of Education have no jurisdiction over discrimination by private individuals or by public or private agencies. Moreover, they are not parties to this case. Adequate remedies exist under the various Civil Rights Acts (1866, 1964, and 1966) and under the Fourteenth Amendment, to remedy discrimination in the rental or purchase of homes. *Jones* v. *Mayer*, 392 U.S. 409 (1968). For discrimination in employment practices see 42 U.S.C. § 2000(e) et seq.; and for voting rights, see 42 U.S.C. § 1971 et seq.

We considered this situation in *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1965), *cert. denied*, 389 U.S. 847 (1967), *affirming* 244 F.Supp. 572 (S.D. Ohio, 1965), where we said:

> "Because of factors in the private housing market, disparities in job opportunities, and other outside influences, (as well as positive free choice by some Negroes), the imposition of the neighborhood concept on existing residential patterns in Cincinnati creates some schools which are predominantly or wholly of one race or another. Appellants insist that this situation, which they concede is not the case in every

school in Cincinnati, presents the same separation and hence the same constitutional violation condemned in *Brown*. We do not accept this contention. The element of inequality in *Brown* was the unnecessary restriction on freedom of choice for the individual, based on the fortuitous, uncontrollable, arbitrary factor of his race. The evil inherent in such a classification is that it fails to recognize the high value which our society places on individual worth and personal achievement. Instead, a racial characterization treats men in the mass and is unrelated to legitimate governmental considerations. It fails to recognize each man as a unique member of society.

"In the present case, the only limit on individual choice in education imposed by state action is the use of the neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of a racially restrictive system? We think not. In this situation, while a particular child may be attending a school composed exclusively of Negro pupils, he and his parents know that he has the choice of attending a mixed school if they so desire, and they can move into the neighborhood district of such a school. This situation is far removed from *Brown*, where the Negro was condemned to separation, no matter what he as an individual might be or do. Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school, prejudice.[4] We read *Brown* as prohibiting only enforced segregation."

"4. The District Court correctly excluded evidence of alleged discrimination in the public and private housing

Subsequently we considered *Deal* again and affirmed the principles therein set forth. *Deal* v. *Cincinnati Bd. of Educ.*, 419 F.2d 1387, *cert. denied*, 402 U.S. 962 (1971). Twice the Supreme Court had opportunity to review *Deal* and twice it declined to do so.

Deal, of course, dealt with alleged de facto segregation in northern schools. But, as we have shown, there is concentration of blacks in the inner cities in the north the same as it exists in the south. The same rule of law should apply throughout the country.

Also, we are not unmindful of programs of the Federal Government and of industry for job training and employment opportunities for minority groups. As these programs become more effective the black population will be able to move into better living quarters and neighborhoods, and their children will attend schools in these neighborhoods.

It should be pointed out that there is quite a difference between voluntary busing and forced or induced busing, in the effect it has on the children and their parents. Forced busing is not much different than segregation under sanction of law, referred to in *Brown I*, as generating feelings of inferiority on the part of the children (347 U.S. 483, 494) and frustration on the part of the parents.

Footnote continued—

markets. Such discrimination is caused, if in fact it does exist, by persons who are not parties to this case and the Board has no power to rectify that situation. If appellants have any valid claim for infringement of their rights by public housing or urban renewal officials, they may obtain appropriate relief against them under the Fourteenth Amendment. With respect to private actions amounting to discriminatory practice, while there is no federal constitutional right available to appellants, they may seek relief from the state Civil Rights Commission or in the state courts, if relief is denied, under the provisions of the Ohio Fair Housing Law. Ohio Rev. Code §4112.01-.07." (369 F.2d at 60)

There is also a considerable division of opinion in the black community over enforced busing.[3]

We have approved transportation of children to effect the transfer policies adopted by the Court, and in connection with the "pockets and coves." Where certain school buildings are overcrowded and others have vacant spaces busing should be provided to the children of either race so that all of the school facilities will be used, giving preference to minority groups desiring to be transferred to such schools from schools in which they are in the majority.

We do not read *Swann* and related cases as holding that there should be racial quota or mixture in each public school of the city, and certainly not in those areas where the children, on account of their economic status, would never have attended those schools if there had been no state imposed segregation.

Also, I am not unmindful of the difficult and trying experiences of the District Judge whose opinions in the past have been under attack by the plaintiffs. This is the first appeal taken by defendants. I believe the District Judge has done well in the handling of this case, and the decisions which he has made he felt were compelled by decisions either of the Supreme Court or of this Court. The law in this field has been complex as well as confusing to lawyers, judges and legal scholars. This situation still persists.[4]

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3. Counsel for the School Board relies on the cross-examination of plaintiff's witness, Maizelle Smith, who agreed that not quite one-half of the black parents oppose forced busing. At the National Black Political Convention held in Gary, Indiana (March, 1972), mandatory busing and school integration were condemned as racist and as preserving a black minority structure.

4. "The Supreme Court 1970 Term," 85 Harvard Law Review 1 (1971); "School Desegregation After Swann, A Theory of Governmental Responsibility," Univ. of Chicago Law Review, No. 2, Winter, 1972.

Part of the difficulties experienced by the District Judge in the present case were the extreme positions adopted by the plaintiffs and the defendants. The District Judge found that the plan proposed by the plaintiffs (prepared by Dr. Gordon Foster) to be put into effect not later than the 1973-74 school year, was unrealistic and that Dr. Foster had little experience or knowledge as to Memphis schools.[5] We agree.

Nor do we think that Plan B is necessary or required under the evidence in this case. In our judgment it is not necessary to have racial mixture in every school in the city. The cost is always a factor to be considered. Funds for operation of the 1972-73 school year have already been appropriated by the city. The School Board has no authority to levy taxes or appropriate money. If Plan A is now put into effect it may adversely affect the present year's school program.[6]

In our opinion, the school system cannot be faulted for conditions resulting from the residential patterns of Memphis, and the Board ought not to be charged with the duty of their entire elimination. In order to have a unitary system it should not be necessary to bus 14,000 school children.

The Court should also consider the claims of children who contend that their constitutional rights have been violated by the busing plan.

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5. The Foster plan was also dependent on dedicated cooperation of the populace. Dr. Foster testified as a witness for plaintiffs and prepared the plan adopted by the District Court in the celebrated case of *Bradley* v. *School Board of the City of Richmond*, ... F.2d ..... (4th Cir. 1972).

6. In the University of Chicago Law Review article entitled "School Desegregation After Swann, A Theory of Governmental Responsibility," (Univ. of Chicago Law Review, No. 2, Winter, 1972) the author poses the question, "Whether the costs of achieving desegregation in any given situation outweigh the legal, moral and educational considerations favoring it."

Further, consideration should also be given to Title VIII of Education Amendments of 1972.[7]

The Education Amendments of 1972 contain a prohibition against the use of appropriated funds for busing. This may seriously interfere with the Board's obtaining any federal funds. The District Court found that the funds had already been appropriated by the City for the 1972-73 school year. It is therefore obvious that if 14,000 students have to be bused other programs will have to be curtailed or even abolished, and the children will suffer. It is also very unlikely that the Board will be able to obtain any funds from the state for busing.

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7. Title VIII of Education Amendments of 1972, published in U.S. Law Week, Vol. 41, No. 3, July 18, 1972, provides:

TITLE VII—GENERAL PROVISIONS RELATING TO THE ASSIGNMENT OR TRANSPORTATION OF STUDENTS

PROHIBITION AGAINST ASSIGNMENT OR TRANSPORTATION OF STUDENTS TO OVERCOME RACIAL IMBALANCE

SEC. 801. No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

PROHIBITION AGAINST USE OF APPROPRIATED FUNDS FOR BUSING

SEC. 802(a). No funds appropriated for the purpose of carrying out any applicable program may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system, except on the express written voluntary request of appropriate local school officials. No such funds shall be made available for transportation when the time or distance of travel is so great as to risk the health of the children or significantly impinge on the educational process of such children, or where the educational opportunities available at the school to which it is proposed that any such student be transported will be substantially inferior to those opportunities offered at the school to which such student would otherwise be assigned under a nondiscriminatory system of school assignments based on geographic zones established without discrimination on account of race, religion, color, or national origin.

Memphis is probably no different than other large, harried cities throughout the nation who are experiencing real difficulty in obtaining sufficient funds to pay for all the services which they are required to render, including relief to the indigent. These cities are unable to obtain sufficient funds from taxation, as their citizens are already being taxed by the states and the cities as much as the traffic will bear. So they are all hopeful of persuading the Federal Government to share tax revenues, but this will require Congressional action.

These are all matters which the District Court has a right to consider on the issue whether any plan is practical or feasible. In my opinion the busing of 14,000 school children is neither practical nor feasible.

Footnote continued—

(b) No officer, agent, or employee of the Department of Health, Education, and Welfare (including the Office of Education), the Department of Justice, or any other Federal agency shall, by rule, regulation, order, guideline, or otherwise (1) urge, persuade, induce, or require any local education agency, or any private nonprofit agency, institution, or organization to use any funds derived from any State or local sources for any purpose, unless constitutionally required, for which Federal funds appropriated to carry out any applicable program may not be used, as provided in this section, or (2) condition the receipt of Federal funds under any Federal program upon any action by any State or local public officer or employee which would be prohibited by clause (1) on the part of a Federal officer or employee. No officer, agent, or employee of the Department of Health, Education, and Welfare (including the Office of Education) or any other Federal agency shall urge, persuade, induce, or require any local education agency to undertake transportation of any student where the time or distance of travel is so great as to risk the health of the child or significantly impinge on his or her educational process; or where the educational opportunities available at the school to which it is proposed that such student be transported will be substantially inferior to those offered at the school to which such student would otherwise be assigned under a nondiscriminatory system of school assignments based on geographic zones established without discrimination on account of race, religion, color, or national origin.

(c) An applicable program means a program to which the General Education Provisions Act applies.

Plaintiffs have filed a motion to strike the reply brief of the Board, containing an article entitled "The Evidence On Busing," by David J. Armor, a sociologist, which article seems to explode some existing concepts on the value of busing. Plaintiffs' position is that it was not the proper subject of a reply brief, and for the Court even to consider it would deprive them of their due process rights. But in *Brown I* the Supreme Court not only cited, but relied heavily on, articles written by sociologists, and it was not considered that the Supreme Court was depriving the Board of Education of its Fourth Amendment rights.

Footnote continued—

PROVISION RELATING TO COURT APPEALS

SEC. 803. Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on January 1, 1974.

PROVISION AUTHORIZING INTERVENTION IN COURT ORDERS

SEC. 804. A parent or guardian of a child, or parents or guardians of children similarly situated, transported to a public school in accordance with a court order, may seek to reopen or intervene in the further implementation of such court order, currently in effect, if the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process.

PROVISION REQUIRING THAT RULES OF EVIDENCE BE UNIFORM

SEC. 805. The rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States.

APPLICATION OF PROVISO OF SECTION 407(a) OF THE CIVIL RIGHTS ACT OF 1946 TO THE ENTIRE UNITED STATES

SEC. 806. The proviso of section 407(a) of the Civil Rights Act of 1964 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by

On the remand, in my judgment the District Court ought to consider this article and any response thereto which the plaintiffs may care to make, so that there will be no question but that plaintiffs have not been deprived of their constitutional rights.

I see no necessity to vacate our stay order as it extended only pending appeal, and automatically expired upon the filing of the decision of the Court.

Nor do I see any necessity at this time for ruling on the constitutionality of Section 803 of the Education Amendments of 1972, as this would be premature.

I would remand for further consideration. No costs allowed.

Footnote continued—

requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil Action No. 3931

DEBORAH A. NORTHCROSS, ET AL.,
Plaintiffs,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, ET AL.,
Defendants.

Memorandum Decision

This decision constitutes the findings and conclusions of the Court resulting from a hearing scheduled and conducted for a two-fold purpose. The two purposes were first, to determine when this Court's previously approved desegregation plan, known as Plan A, should be placed in effect and second, to determine if changes made in the existing plan of desegregation by the defendant Board without prior court approval should be continued until Plan A is placed in effect.

Plan A was prepared by staff personnel of the defendant system pursuant to guidelines established by the Court. It was adopted and approved by this Court on April 20, 1972, after an extensive hearing which pertained to six different plans. The adoption of it was appealed by the plaintiffs and defendants. On the application of the defendants a stay of its implementation was granted by the Court of Appeal on June 2, 1972, pending that Court's ruling on an expedited appeal.

This Court's ruling of April 20, 1972, directed the defendants to implement Plan A at the beginning of the 1972-73 school year; however, the school year commenced on August 28, 1972 while the stay of the Court of Appeals was still in effect. On August 29, 1972, the Court of Appeals affirmed this Court's April 20, 1972 order in its entirety, dissolved the stay and ordered this Court's plan implemented "forthwith".

On September 14, 1972, this Court ruled that the defendant system should be prepared to implement Plan A by November 27, 1972. That date was chosen because all preparations for implementation were halted for 88 days by the stay. Therefore, this Court concluded that a like amount of time from the dissolution of the stay should be allowed as the earliest date for implementation. On September 14, 1972, the Court further ruled that the September 22, 1972 hearing would be held to determine if a further delay should be allowed in accordance with and for the reasons set forth in the Report to the Court and Motion to Amend filed by the defendants on September 13, 1972.

On September 21, 1972, the Court of Appeals denied a motion of the defendants for a further stay pending application for certiorari to the Supreme Court.[1]

At the commencement of the hearing on September 22, 1972, counsel for the defendants stated that the defendants desired to present certain proposed specific modifications to Plan A. Because it appeared that some of those modifications meant merely relitigating the merits of Plan A

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1. The order denying this motion for a stay pending application for certiorari clearly stated that Section 803 of the Education Amendments of 1972, Public Law 92-318, did not authorize a stay in this case pursuant to that legislation because this Court's busing plan is not designed to achieve racial balance; rather it is designed to cure the product of a de jure dual system.

and further because no application by motion for the specific amendments sought had been filed prior to the hearing, the Court ruled that no proof could be offered at that hearing pertaining to modification of Plan A. The defendants may seek relief with regard to practical and unanticipated problems which have arisen since the Court issued its April 20, 1972 order; however, this relief requires the filing of a motion and a showing of a good faith attempt to comply with the previous order. *Kelley* v. *Metropolitan Board of Education, Nashville,* ..... F2d ..... (C.A. 6 Nos. 71-1778-79 decided May 30, 1972).[2]

The issues raised at the hearing concerning the time of implementation of Plan A involve contentions on the part of the defendants that implementation of Plan A should be further deferred for economic, administrative and educational reasons caused by the stay and the opening of school, until the beginning of the second semester of this school year (January 22, 1973) for the elementary schools and the beginning of the 1973-74 school year for all junior and senior high schools (hereinafter referred to collectively as secondary schools). On the other hand, counsel for the plaintiffs contend that this Court should not have authorized a deferment in the implementation of Plan A until November 27, 1972, but in no event should any portion of the implementation be deferred later than that date.

In support of their contentions the defendants offered proof which establishes that there are alternate opportunities for a transportation contract. One proposed con-

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2. From testimony relevant to the issues pertaining to whether or not the unapproved changes made by the defendant Board should continue, it appears that the defendants desire to submit a substantial number of after thought changes to Plan A in spite of the fact that this Court conducted an extensive hearing on five different plans prepared by Board personnel and in spite of the fact that the Court of Appeals has considered and approved in its entirety the plan chosen by this Court.

tractor is the publicly owned Memphis Transit Authority which would use some of its regular buses on a charter basis for transporting the students. The other proposed contractor is a privately owned firm, School Transports, Inc., of Kansas City, Missouri. The respective proposals of the potential transportation contractors contain provisions, the relative merits of which should be weighed carefully and resolved by the defendant Board. The Memphis Transit Authority can commence transportation within a matter of weeks, its drivers are experienced and familiar with the city, and there would be no penalty clause for cancelation; however, its bid is $839,000.00 per year, whereas the School Transports, Inc., bid is $499,000.00 per year. Furthermore, the buses to be used by Memphis Transit Authority are regular public transit buses and therefore are not painted and equipped as school buses. This factor would prevent the defendants from claiming possible partial reimbursement from the state school transportation fund. School Transports, Inc., will require at least ninety days after signing a contract to properly prepare for commencement of operations.

With regard to administrative and educational problems in the implementation of Plan A, the proof shows that the considerable preparations for the implementation were abandoned during the period of the stay. Accurate enrollment figures for the current year are not yet available. Early incomplete figures indicate a smaller total enrollment with a higher percentage of Negro students. Hearing Ex. 3. When accurate enrollment figures become available, assignments to different schools and to transportation routes, for those eligible for transportation, must be made. Physical transfers of equipment, books and personnel must be planned and executed. In addition, some renovations must be made to permit the pairing and clustering required. The most difficult problems in this

regard pertain to two sets of pairings of secondary schools called for in Plan A, namely the Geeter-Fairley and Manassas-Frayser school pairings. All four of these schools presently have both junior and senior high schools on their respective sites. Geeter and Manassas are all black schools, Frayser is all white and Fairley is predominantly white. Plan A calls for a swap of students which sends all junior high students from the Frayser and Manassas zones to Manassas and all senior high students to Frayser. The same method will be employed with regard to the Geeter and Fairley zones. Geeter will receive all junior high students and Fairley will receive all senior high students. Preparations for these swaps involve more extensive renovations due to necessary laboratory equipment, particularly for science courses. These renovations are more difficult to accomplish while the schools are being attended. The Geeter facilities present particularly difficult renovation problems.

With regard to additional educational problems, the teaching and grading periods of this system are based upon nine-week periods for elementary pupils and six-week periods for secondary students. The one nine-week period before the end of the semester ends on October 27, 1972, and the two six-week periods before the end of the semester end on October 6 and November 17, 1972. Therefore, the November 27, 1972 date for implementation would be more disruptive because it would require changes of schools and in some cases teachers during grading periods for both the elementary and secondary schools.

Upon consideration of the proof the Court is of the opinion that Plan A should be implemented by the beginning of the second semester of this year in all grades and all schools except those hereinafter indicated. The pairings of Geeter and Fairley and Manassas and Frayser

secondary schools will be deferred until the beginning of the 1973-74 school year to permit necessary renovations at both sets of schools.

The two modifications to Plan A which were agreed upon by counsel for both sets of parties are approved. Those are the continuation of Messick Junior High at the Messick school site and not closing Pine Hill elementary school. The other phase of Plan A applicable to Messick School shall be implemented at the beginning of the second semester of this year.

As previously indicated another purpose of the September 22, 1972 hearing was to determine if changes made in the existing plan of desegregation by the defendant Board prior to this school year without court approval should be continued until Plan A is implemented. These changes included alteration of zone boundaries and new transfer policies, as well as partial and piecemeal implementation of Plan A. While it is true that some desegregation benefits were derived from these actions, it is also true that some of the actions were in furtherance of protecting white majorities and certain white patrons.

One of the new transfer provisions reads as follows: "No pupil may transfer into, or out of, a school where such transfer would be detrimental to the stability of an integrated student body of the school to which, or from which, such request is made." Presumably on the basis of this vague provision the defendant system has adopted and implemented a very complex policy at Central High School. It has reissued transfers to Negro students who attended Central last year as tenth and eleventh grade students. It has issued transfers into Central to current tenth grade Negro students if they have a brother or sister in Central by a transfer. All other Negro transfers into

Central have been denied and all white transfers out of the zone have been denied. This complex problem is further complicated by the fact that Plan A calls for a boundary change whereby Central is to incorporate in its zone a portion of the northern part of the Hamilton zone. When this is done it will add an unknown but significant number of Negro students to the school. The situation is further complicated by the fact that undoubtedly there are some majority to majority white students now attending Central. Because undoing this complex system would be disruptive to so many different categories of students, this Court concludes that the implementation of Plan A at Central High School should also be deferred until the commencement of the school year 1973-74 and all existing transfers should be continued for the remainder of the year.[3]

The above quoted general transfer provision should be canceled when Plan A is placed in effect. At that time the problem sought to be corrected probably will not exist in Plan A schools because transfers to and from those schools are extremely limited. If the defendants wish to submit a transfer provision for general application with regard to schools not affected by Plan A, the limitation on transfers into a zone should be one that prohibits transfers beyond the number which will change the majority race of a school. If there are special practical problems in a zone, such as the opening of a large housing project, the defendants should file in this cause any proposals which seek variations in the overall plan.

Regrettably the defendants have seen fit to reinstitute the practice of recognizing pockets and coves in spite of their former assurance that it was the Board's desire to abandon this practice which has caused so much trouble

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3. The Court also observes that it is doubtful if this knotty problem could be untangled before the end of the school year.

in the desegregation efforts in the past. Boundary changes different from those established by Plan A were adopted for elementary, junior high and high schools, with regard to the zones for Geeter, Levi, Raineshaven and Westhaven elementary schools, the zones for Geeter, Chickasaw and Lanier junior high schools and the zones for Geeter and Fairley high schools. These unapproved alterations must be discontinued as of the commencement of the second semester of this school year, along with all other zone boundary variations from Plan A not otherwise excepted by the provisions of this ruling.

Unless specifically excepted by the provisions of this decision all transfer provisions and policies, including majority to majority transfers and the proposed eleventh grade transfer provision, which are not provided for in the April 20, 1972 ruling of this Court as subsequently modified by the Court with regard to twelfth grade students, etc., must be discontinued and the students reassigned to their proper zones at the commencement of the second semester of this school year.

All changes made by the defendants for this school year which adopt the provisions of Plan A as approved shall be continued.

The above conclusions set forth this Court's opinion of how and when the defendants must comply with the Court of Appeals order to implement this Court's April 20, 1972 order "forthwith". This Court is not unmindful of the difficulties to be encountered by staff personnel in this implementation, particularly in view of the disagreement by a majority of the defendant Board with the law of the land and the community hostility to the necessary methods of overcoming the products of the former dual system. However, the Court is also not unmindful of the facts that it has been over eighteen years since de jure dual system

public schools were declared unconstitutional and it has been over twelve years since the Negro patrons and pupils filed this lawsuit, seeking what the Constitution guarantees them. The appellate courts have ordered us (this Court, the plaintiffs and the defendants) to see that those constitutional guarantees are provided in the City of Memphis. It is the purpose of this Court to see that the orders and interpretations of the appellate courts are implemented without further delay and in as orderly a manner as possible.

Because Plan A presently on file does not include the schools in the southwest part of the city which the defendant system commenced operating at the beginning of this school year due to the annexation of that area by the city, the defendants are directed to file in the cause their present and proposed pupil assignment plan for those schools.

/s/ Robert M. McRae, Jr.
United States District Judge

9-26-72
Date

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APPENDIX E

THE Public Interest

NUMBER 28, SUMMER 1972, PRICE: $2.00

Of Populism and Taxes

Irving Kristol

The Educational Entrepreneur	*Hon. Edith Green*
American Catholics—Making It or Losing It?	*Andrew M. Greeley*
Up and Down with Ecology	*Anthony Downs*
The Street Gangs and Ethnic Enterprise	*Nathan Glazer*
Clean Rhetoric, Dirty Water	*A. Myrick Freeman III & Robert H. Haveman*
Education and Economic Equality	*Lester C. Thurow*

The Evidence on Busing

David J. Armor

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RESEARCH REPORT

The Evidence on Busing

DAVID J. ARMOR

The legal basis of the national policy of integration—and of the school busing issue today—is the declaration of the Supreme Court in 1954 that

> to separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Few decisions of the Court have provoked so much controversy for so long, or have had so much impact on the way of life of so many persons, as the case of *Brown v. the Board of Education of Topeka*, where this doctrine is stated. Policy makers have used it to restructure political, economic, and social institutions. Groups have rioted and states

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Rarely can an unpublished academic article have attracted as much attention and publicity as has this analysis of busing. Professor Armor, a sociologist who specializes in research methods and social statistics, played a leading role in research on the Boston METCO study, which was one of the earliest evaluations of the effects of busing on black students. In this article he reports the detailed findings of that study plus those of several other comparable studies. While his manuscript was being copy-edited in our office, its findings were being "reported" in the national press (e.g., New York Times, Washington Post, Boston Globe*), and they have even been denounced publicly by critics who have never seen the results of the studies themselves. We are publishing the full text of this academic article —all the graphs, footnotes, and references are included at the end —because we think that, in so controversial a matter as busing, it is important to be as precise as possible, even at the risk of pedantry. Inevitably, findings such as those of Professor Armor give rise not only to public but also to scholarly controversy. In our next issue we shall print comments on Professor Armor's article by other scholars.*
—Editors

have divided over actions, direct and indirect, that have flowed from this ruling. And social scientists have proudly let it stand as a premier axiom of their field—one of the few examples of a social theory that found its way into formal law.

Few persons, perhaps, know of the role played by the social sciences in helping to sustain the forces behind desegregation. It would be an exaggeration to say they are responsible for the busing dilemmas facing so many communities today, yet without the legitimacy provided by the hundreds of sociological and psychological studies it would be hard to imagine how the changes we are witnessing could have happened so quickly. At every step—from the 1954 Supreme Court ruling, to the Civil Rights Act of 1964, to the federal busing orders of 1970—social science research findings have been inextricably interwoven with policy decisions.

And yet, the relation between social science and public policy contains a paradox in that the conditions for adequate research are often *not* met until a policy is in effect, while the policy itself often cannot be justified until supported by the findings of science. In consequence, the desire of scientists to affect society and the desire of policy makers to be supported by science often lead to a relation between the two that may be more political than scientific. Further, this can mean that the later evaluation research of a social action program may undo the very premises on which the action is based—as is the case somewhat in the Coleman Report on the effect of schools on achievement. There are obvious dangers for both social science and public policy in this paradox. There is the danger that important and significant programs —which may be desirable on moral grounds—may be halted when scientific support is lacking or reveals unexpected consequences; conversely, there is the danger that important research may be stopped when the desired results are not forthcoming. The current controversy over the busing of schoolchildren to promote integration affords a prime example of this situation.

The policy model behind the Supreme Court's 1954 reasoning—and behind the beliefs of the liberal public today—was based in part on social science research. But that research did not derive from the conditions of induced racial integration as it is being carried out today. These earlier research designs were "ex post facto"—i.e., comparisons were made between persons already integrated and individuals in segregated environments. Since the integration experience occurred *before* the studies, any inferences about the effects of *induced* integration, based on such evidence, have been speculative at best. With the development of a variety of school integration programs across the country there arose the opportunity to conduct realistic tests of the integration policy model that did not suffer this limitation. While it may have other shortcomings, this research suffers neither the artificial constraints of the laboratory nor the causal ambiguity of the cross-sectional survey. The intent of this essay is to explore some of this new research and to interpret the findings. What we will do, first, is to sketch the evolution of the social science model which became the basis of public policy, and then review a number of tests of this model

as revealed in recent social science studies of induced school integration and busing.

The Integration Policy Model: Stage I

The integration model which is behind current public policy is rooted in social science results dating back to before World War II. The connections between segregation and inequality were portrayed by John Dollard (1937) and Gunnar Myrdal (1944) in the first prestigious social science studies to show how prejudice, discrimination, segregation, and inequality operated to keep the black man in a subordinate status. Myrdal summarized this process in his famous "vicious circle" postulate: White prejudice, in the form of beliefs about the inferior status of the black race, leads to discrimination and segregation in work, housing, and social relationships; discrimination reinforces social and economic inequality; the resulting inferiority circles back to solidify the white prejudice that started it all. The vicious circle theory was the integration policy model in embryonic form.

Along with these broad sociological studies there also appeared a number of psychological experiments which were to play a crucial role in the policy decisions. The most notable were the doll studies of Kenneth and Mamie Clark (1947). They found that preschool black children were much less likely than white children to prefer dolls of their own race. Though this tendency tapered off among older children, the Clarks concluded that racial awareness and identification occurred at an early age and that the doll choices suggested harmful and lasting effects on black self-esteem and performance. Other studies confirmed these early findings (Proshansky and Newton, 1968; Porter, 1971). These studies added a psychological dynamic to explain the operation of the vicious circle: Prejudice and segregation lead to feelings of inferiority and an inability to succeed among the blacks; these sustain inequality and further reinforce the initial white prejudice. In other words, segregation leads to serious psychological damage to the black child; that damage is sufficient to inhibit the kind of adult behavior which might enable the black man to break the circle.

How could the circle be broken? This question plagued a generation of social scientists in quest of a solution to America's race problems. Of a number of studies appearing after the war, two which focussed upon the effects of segregation and integration upon white racial attitudes had especial impact. The first was a section of Samuel Stouffer's massive research on the American soldier during World War II (1949). Stouffer found that white soldiers in combat companies with a black platoon were far more likely to accept the idea of fighting side by side with black soldiers than were white soldiers in non-integrated companies. The second was the study by Morton Deutsch and Mary Evans Collins (1951) of interracial housing. Comparing residents of similar backgrounds in segregated and integrated public housing projects, they found that whites in integrated housing were

more likely to be friendly with blacks, to endorse interracial living, and to have positive attitudes towards blacks in general than were whites living in the segregated projects. Though neither of these studies could ascertain the beliefs of these individuals *prior* to integration, neither author had reason to believe that the integrated whites differed from the segregated whites before the former's experience with blacks. They concluded, therefore, that the positive results were due to the effect of interracial *contact* and not to prior positive belief.

The culmination of this research was Gordon Allport's influential work, *The Nature of Prejudice* (1953). Using the work of Stouffer, Deutsch and Collins, and others, he formulated what has come to be known as the "contact theory":

> Contacts that bring knowledge and acquaintance are likely to engender sounder beliefs about minority groups. . . . Prejudice . . . may be reduced by equal status contact between majority and minority groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports (i.e., by law, custom, or local atmosphere), and if it is of a sort that leads to the perception of common interests and common humanity between members of the two groups.

The clear key to breaking the vicious circle, then, was contact. By establishing integrated environments for black and white, white prejudice would be reduced, discrimination would decline, and damaging effects upon the black child's feelings and behavior would be reduced.

While the Supreme Court based its 1954 decision upon the narrower relationship between legally sanctioned segregation and psychological harm, it is clear that the *modus operandi* by which the damage would stop is implied by the contact theory. With the 1954 decision, then, contact theory became an officially sanctioned policy model, and the Southern public school systems became prime targets for its implementation.

The Integration Policy Model: Stage II

In the eyes of the Northerner, segregation had always been a Southern problem. The Supreme Court's action at first reinforced this belief, since state-sanctioned school segregation was rare outside the South. But events in the 1960's changed this for good. While the modern civil rights movement began in the South, its zenith was reached in the March on Washington in the late summer of 1963. Organized to dramatize the failure of court action to end segregation in the South, the March brought together 250,000 persons in the most impressive organized protest meeting in the history of the United States, and showed President Kennedy and the Congress the deep and massive support for anti-discrimination legislation.

The Congress answered this appeal by passing the Civil Rights Act of 1964, the strongest such act since the Reconstruction period. The Act included strong sanctions against discrimination in education, employment, housing, and voting (the last supplemented by the Vot-

ing Rights Act of 1965), and while its thrust was still aimed at the South, it also set standards that could be used against de facto segregation in the North (for example, the Title VI provisions directed the withholding of federal funds from localities which intentionally maintain segregated schools—and this has recently been applied to the city of Boston). Equally important, it set in motion a social science study that was to have an immense impact upon public policy in the North as well as the South. As part of the Act, the Congress commissioned the United States Office of Education to conduct a survey "concerning the lack of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions at all levels in the United States. . . ." Sociologist James Coleman was selected to head a team to design and conduct the survey.

The Coleman Report (1966), as it has come to be known, contained striking evidence of the extent of school segregation not only in the South but in all parts of the country. While the South was more segregated than the North, fully 72 per cent of black first graders in the urban North attended predominantly black schools. The report also confirmed one of the basic assumptions of the Stage I model: that black students performed poorly compared to white students. Using results from a variety of achievement tests, Coleman reported that throughout all regions and all grade levels, black students ranged from two to six years behind white students in reading, verbal, and mathematics performance. Equally, black students were shown to have lower aspirations, lower self-esteem about academic ability, and a more fatalistic attitude about their ability to change their situation.

The Coleman study, however, also reported some findings that surprisingly were not in accord with the early model. For one thing, black children were already nearly as far behind white children in academic performance in the *first* grade as they were in later grades. This raised some question about whether school policies alone could eliminate black/white inequalities. Adding to the significance of this finding were the facts that black and white schools could not be shown to differ markedly in facilities or services, and that whatever differences there were could not be used to explain the disparities in black and white student achievement. This led Coleman to conclude that

> schools bring little influence to bear on a child's achievement that is independent of his background and general social context; and this very lack of an independent effect means that the inequalities imposed on children by their home, neighborhood, and peer environment are carried along to become the inequalities [of their adult life].

While the findings about segregation and black/white differences have been widely publicized and largely accepted, this concluding aspect of Coleman's findings has been ignored by educational policy makers. Part of the reason may derive from the methodological controversies which surrounded these findings (e.g., Bowles and Levin, 1968), but the more likely and important reason is that the implications were devastating to the rationale of the educational establish-

ment in its heavy investment in school rehabilitative programs for the culturally deprived; the connection between public policy and social science does have its limitations.

We must return to the policy makers one more time for an important input into the final policy model. In 1965, President Johnson requested the United States Commission on Civil Rights to conduct an investigation into the effects of de facto segregation in the nation and to make recommendations about how it might be remedied. He expressed hope that the findings "may provide a basis for action not only by the federal government but also by the states and local school boards which bear the direct responsibility for assuring quality education." The Commission recommendations, in its 1967 volume entitled *Racial Isolation in the Public Schools*, constitute the most comprehensive policy statement to date on the subject of school integration; it is the policy which is, indeed, being followed by many states and local school boards throughout the country.

Using data from the Coleman study and several other original studies prepared for the Commission, the report concluded that

> Negro children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be. Negro children who attend predominantly Negro schools do not achieve as well as other children, Negro and white. Their aspirations are more restricted than those of other children and they do not have as much confidence that they can influence their own futures. When they become adults, they are less likely to participate in the mainstream of American society, and more likely to fear, dislike, and avoid white Americans. The conclusions drawn by the U.S. Supreme Court about the impact upon children of segregation compelled by law—that it "affects their hearts and minds in ways unlikely ever to be undone"—applies to segregation not compelled by law.

To remedy this situation, the Commission recommended that the federal government establish a uniform standard for racial balance and provide financial assistance to states that develop programs to meet the standard. The Commission did not recommend a precise standard, but it did suggest that the standard be no higher than 50 per cent black in any single school. Likewise, the Commission did not specifically recommend that busing be the method whereby integration is accomplished. But the realities of residential segregation in many cities throughout the nation offered little alternative to the use of busing if these integration standards were to be attained.

This, then, became the basis for the integration policy model as applied to public schools. While the implementation of racial balance programs has differed from one locality to the next, the underlying rationale of all these programs is similar to that first formulated by the Supreme Court and extended by the Civil Rights Commission. The full policy model may be summarized as follows: The starting point is white prejudice consisting of stereotyped beliefs about black people. These beliefs lead to discriminatory behavior in

employment, housing, schooling, and social relationships in general. Discrimination in turn leads to social and economic inequality on the one hand, and segregation on the other hand. Inequality and segregation are mutually reinforcing conditions, reflecting not only the judicial doctrine that separation is inherently unequal, but also the social reality that segregation of a deprived group can cut off channels and networks that might be used to gain equality. Segregation and inequality combine to cause psychological damage in children resulting in lower achievement, lower aspirations, and less self-esteem. As the child grows older, this damage leads, on the one hand, to further social and economic inequalities in the form of inadequate education and inferior jobs and, on the other hand, to black alienation, prejudice, and hostility towards whites. This in turn leads to increased white prejudice (the vicious circle) and a general polarization of race relations. Given these cause and effect relations, the elimination of segregation in schooling should act as a countervailing force for black students by increasing achievement, raising aspirations, enhancing self-esteem, reducing black/white prejudices and hostility, and enabling black students to find better educational and occupational opportunities. It then follows that social and economic inequalities would be lessened and the vicious circle would be bent if not broken.

It must be stressed that this model is construed from public policy. While many of the causal relationships assumed in the model are, indeed, based on many years of scientific research in psychology and sociology, it is doubtful that any two specialists in the field of race relations would agree on all of the components of the model. Be that as it may, it is more to the point to stress that we are not setting out to test the *full* model. *We are specifically interested in those aspects of the model that postulate positive effects of school integration for black students; namely, that school integration enhances black achievement, aspirations, self-esteem, race relations, and opportunities for higher education.* We do not have data on the effects of integration on adults, nor on the effects of other types of integration, such as neighborhood housing, employment, and other forms. More important, the school integration programs we review here have two important characteristics in common that may limit generalizability. First, they are examples of "induced" integration as opposed to "natural" integration. Induced integration is brought about by the decision of a state or local agency to initiate a school integration program (sometimes voluntary, sometimes mandatory), rather than by the "natural" process whereby a black family makes an individual decision to relocate in a predominantly white community. Second, all of these programs have had to use varying amounts of busing to accomplish integration. This makes it difficult to separate out the potential effects of busing, if any, from the integration experience *per se*. In other words, *we will be assessing the effects of induced school integration via busing*, and not necessarily the effects of integration brought about by the voluntary actions of individual families that move to integrated neighborhoods. This is a more limited focus,

yet induced integration, usually necessitating some amount of busing, is precisely the policy model that has been followed (or is being considered) in many communities throughout the country.

The Data

Many of the cities which desegregated their schools to achieve a racial balance have conducted research programs to evaluate the outcomes of desegregation. It is from these studies that we can derive data to test the school and busing hypotheses stemming from the integration policy model. Since the evaluations were conducted independently, the variables studied and the research designs differ from one study to the next, and the quality of the research and the reports varies considerably. Accordingly, we have been selective in choosing studies to include in our analysis. Our choices have been guided by two considerations: 1) A study must employ a longitudinal time-span design, with the same tests administered at different times during the integration experience so that *actual* changes can be assessed; and 2) a study must have a control group for comparison with integrated black students. The ideal control group, of course, would consist of black students who are identical to the integrated students in every way except for the integration experience. Since such studies are rare, an "adequate" control group for our present purposes is either a group of non-bused black students who are reasonably comparable to the bused black students, or a group of white students in the same school as the bused black students. In the latter case, the effects of integration are revealed in the changes in the black/white differential for the measure in question.[1]

The data we will use can be classified into two parts. The first part consists of findings from a study of Boston's METCO program, for whose research design, execution, and analysis we are partly responsible (Walberg, 1969; Armor and Genova, 1970).[2] The data are more complete and offer a more thoroughgoing test of the policy model than many other studies we have seen. The METCO program buses black students of all age levels from Boston to predominantly white middle-class schools in the suburbs. Approximately 1500 black students and 28 suburban communities have participated since the program began in 1966; the study from which our data will be taken covers the period from October 1968 to May 1970. The study used a longitudinal design that called for achievement testing for all students and a questionnaire for the junior and senior high students in three waves: the first at the beginning of the school year in October 1968, a second in May 1969, and a third in May 1970. (For a variety of reasons, the achievement testing was not done for the third wave.) The questionnaire covered several areas, including academic performance, aspirations and self-concept, relations with and attitudes toward white students, and attitudes toward the program.

The METCO study also included a small control group consisting

of siblings of the bused students matched by sex and grade level.[3] The fact that the siblings were from the same families as the bused students means that there is an automatic control for social class and other tangible and intangible family factors. Since the high application rate usually prevented the busing program from taking more than one applicant per family, we had reason to believe that the control students would not differ substantially from the bused students along the important dimensions of ability, aspirations, and so forth. This belief is confirmed by the findings presented in the next section.

In addition to the data for black students, there are also data from a single cross-sectional study done in the spring of 1969 to assess the impact of the program on white sophomores in eight of the suburban schools (Useem, 1971 and 1972). We will cite some of the findings from the Useem study whenever such comparisons seem relevant.

The second part of the data comes largely from reports on integration programs in four other Northern cities throughout the country.[4] In 1964, White Plains, New York, closed down one racially imbalanced inner-city elementary school and began busing the children to predominantly white inner-city schools; the study we cite covers a two-year period from 1964 to 1966 (White Plains Public Schools, 1967). In Ann Arbor, Michigan, there was a similar pattern: A racially imbalanced elementary school was closed in 1965 and the students were bused to predominantly white schools; the study covers a one-year period with a three-year follow-up (Carrigan, 1969). A program in Riverside, California, followed a graduated program of closing its racially imbalanced elementary schools and integrating its predominantly white schools; the program began in 1965 and the study covers a five-year period (Purl and Dawson, 1970; Gerard and Miller, 1971). The fourth program, Project Concern, is similar to METCO. Elementary school children from two inner cities (Hartford and New Haven, Connecticut) are bused to suburban schools in surrounding towns; this program began in 1966—the studies selected cover two years for Hartford (Mahan, 1968) and one year for New Haven (Clinton, 1969). In addition to these five major studies, we will also refer at certain points to studies of other integration programs that seem relevant. One such study is an evaluation of A Better Chance (ABC), a program which places high-ability black students in white preparatory schools in the Northeast (Perry, 1972). This evaluation research used techniques and instruments similar to those used in the METCO study; therefore comparisons with ABC may be more valid than comparisons with some of the other studies.

To test the integration policy model we can group our findings under five major headings—the effects of busing and integration on: (1) academic achievement; (2) aspirations; (3) self-concept; (4) race relations; and (5) educational opportunities. In addition, we will examine a sixth area, program support. In each case, we shall compare bused students with the control groups to assess those

changes that might be uniquely associated with the effects of induced integration.

The Findings: Achievement

None of the studies were able to demonstrate conclusively that integration has had an effect on academic achievement as measured by standardized tests. Given the results of the Coleman study and other evaluations of remedial programs (e.g., Head Start), many experts may not be surprised at this finding. To date there is no published report of *any* strictly educational reform which has been proven substantially to affect academic achievement; school integration programs are no exception.

The changes in reading achievement for elementary and secondary students in the METCO program are shown in Figures 1 and 2.[5] For the elementary students, the grade-equivalent gains for bused third and fourth graders after one year are somewhat greater than those for the control group (.4 to .3), but this is not a statistically significant difference. For grades 5 and 6 the situation is reversed; the control group outgained the bused group (.7 and .5), but again the difference is not significant. We can see that the control group is somewhat higher initially for both grade levels, but this difference, too, is not significant.[6]

In the case of high school students, the bused group scores somewhat higher than the control groups initially (but not significantly so).[7] Nonetheless, the gain scores present no particular pattern. While the bused junior high students increased their grade-equivalent score from 7.5 to 7.7, the control group improved from 7.4 to 7.5; the bused gain is not significantly different from that for the control group. For senior high students the effect is reversed; the control students gain more than the bused students (9 percentile points compared to 4 points), but again the gains are not statistically significant for either group.

The results for reading achievement are substantially repeated in a test of arithmetic skills; the bused students showed no significant gains in arithmetic skills compared to the control group, and there were no particular patterns in evidence.

The White Plains, Ann Arbor, and Riverside studies also found no significant changes in achievement level for bused students in the elementary grades when comparisons were made with control groups. Although the White Plains report did show some achievement gains among the bused students, these were not significantly different, statistically, from gain scores of inner-city black students in 1960. Moreover, when comparisons were made with white students in the integrated schools, the black/white achievement gap did not diminish during the period of the study. The Ann Arbor study compared bused black student gains to white gains and to black student gains in a half-black school.[8] The bused students did not gain significantly more than the black control group, nor did their gains diminish the black/white gap in the integrated schools. On the contrary, a follow-

up done three years later showed that the integrated black students were even further behind the white students than before the integration project began.[9] The Riverside study compared minority students (black and Mexican-American) who had been integrated for differing number of years with the city-wide mean (which consisted of about 85 per cent white students). The minority/white gap had not diminished for fourth graders who had been integrated since kindergarten; the gap in 1970 was as great as it was in 1965 when the program began (Purl and Dawson, 1971). Similar results occurred for minority pupils at other grade levels with differing numbers of years in the integration program.

Studies in the fifth program, Project Concern, showed mixed results. A study of the Hartford students compared bused black students who received special supportive assistance with non-bused inner-city black students (Mahan, 1968). (Although two separate one-year periods were covered, problems with missing data allow valid comparisons for only one full academic year, fall 1967 to spring 1968). The bused students showed significant IQ gains only in grades two and three; the gains in kindergarten and grades one, four, and five were either insignificant or, in two cases, favored the control group. In a study of New Haven students, second and third grade students were randomly assigned to bused and non-bused conditions and were given reading, language, and arithmetic tests in October 1967 (when the busing began) and again in April 1968 (Clinton, 1969). Of the six comparisons possible (three tests and two grades), only two showed significant differences favoring the bused students.[10]

While none of these studies are flawless, their consistency is striking. Moreover, their results are not so different from the results of the massive cross-sectional studies. An extensive reanalysis of the Coleman data showed that even without controlling for social class factors, "naturally" integrated (i.e., non-bused) black sixth-grade groups were still one and one-half standard deviations behind white groups in the same schools, compared to a national gap of two standard deviations (Armor, 1972). This means that, assuming the Coleman data to be correct, the *best* that integration could do would be to move the average black group from the 2nd percentile to the 7th percentile (on the *white* scale, where the average white group is at the 50th percentile). But the social class differences of integrated black students in the Coleman study could easily explain a good deal of even this small gain. Other investigators, after examining a number of studies, have come to similar conclusions (St. John, 1970).

While there are no important gains for the METCO group in standardized test scores, there were some important differences in school grades (See Fig. 3). Even though the bused secondary school students have somewhat higher test scores than the control group, the bused group was about half a grade-point *behind* the control group in 1969, and the bused students dropped even further behind by 1970.[11] The average control student is able to maintain a grade average at above a B— level in the central city, while the average bused student in the suburbs is just above a C average. Although it is

not shown in the Figure, from the Useem study we can estimate the average white student *academic* grade average (i.e., excluding non-academic courses—an exclusion not made for the black students) at about 2.45, or between a B— and C+ average.

Again, if we take into account the Coleman findings, we should not be too surprised. Since black students of the same age are, on average, behind white students in all parts of the country with respect to academic achievement, we should expect their grades to fall when they are taken from the competition in an all-black school to the competition in a predominantly white school. In addition, the bused students may not be adequately prepared for this competition, at least in terms of the higher standards that may be applied in the suburban schools.

Aspiration and Self-concept

In the METCO study we found that there were no increases in educational or occupational aspiration levels for bused students (see Figs. 4 and 5); on the contrary, there was a significant decline for the bused students, from 74 per cent wanting a college degree in 1968 to 60 per cent by May 1970. The control panel actually increased its college aspirations over the same period, but this is probably not a meaningful finding. (The cross-sectional data show a slight decline for the control group in 1970; this cautions us about our interpretation).

At the very least, we can conclude that the bused students do not improve their aspirations for college. The same is true for occupational aspirations, and in this case both the bused students and the controls show a similar pattern. We should point out, however, that the initial aspiration levels are already very high; Coleman found that only 54 per cent of white twelfth graders in the urban North aspired to college, and 53 per cent expected a professional or technical occupation. Therefore, even the slight decline we have found still leaves the bused students with relatively high aspirations compared to a regional norm. Moreover, when achievement is taken into account, black students actually have higher aspirations than white students at similar levels of achievement (Armor, 1967; Wilson, 1967). In this respect, some educators have hypothesized that integration has a *positive* effect in lowering aspirations to more realistic levels; of course, others would argue that any lowering of aspirations is undesirable. However, we shall see in a later section that the METCO students were more likely to start college than the control group.

Since the other cities in our review included only elementary students, they do not provide data on regular educational or occupational aspirations.[12] But two of the studies did examine a concept closely related to aspirations—"motivation for achievement." The findings of the Ann Arbor and Riverside studies corroborate the pattern of high aspirations for black children in both the pre- and post-integration periods. In addition, the Ann Arbor researchers concluded

that the overly high aspiration of black boys may have been lowered by the integration experience. The Riverside study, on the other hand, concluded that there were no significant changes in achievement motivation.

In the METCO study we also found some important differences with respect to academic self-concept (Fig. 6). The students were asked to rate how bright they were in comparison to their classmates. While there were some changes in both the bused and control groups, the important differences are the gaps between the bused students and controls at each time period. The smallest difference is 15 percentage points in 1970 (11 points for the full cross-section), with the control students having the higher academic self-concept. Again, this finding makes sense if we recall that the academic performance of the bused students falls considerably when they move from the black community to the white suburbs. In rating their intellectual ability, the bused students may simply be reflecting the harder competition in suburban schools.

Both the Ann Arbor and Riverside studies made much more extensive inquiry into the realm of self-esteem of black children, although there were no directly comparable data for our academic self-concept measure. The Riverside study did report that, in a special test, minority children (black and Mexican-American) tended to choose white students more often than black students as "the [ones] with good grades." While we will not go into detail on the many other measures used in these studies, we can summarize their findings briefly as follows: 1) Minority children do tend to have lower self-esteem before integration, particularly in the later elementary grades; and 2) integration does not seem to affect the self-esteem measures in any clearly consistent or significant way.

Race Relations

One of the central sociological hypotheses in the integration policy model is that integration should reduce racial stereotypes, increase tolerance, and generally improve race relations. Needless to say, we were quite surprised when our data failed to verify this axiom. Our surprise was increased substantially when we discovered that, in fact, the converse appears to be true. The data suggest that, under the circumstances obtaining in these studies, integration heightens racial identity and consciousness, enhances ideologies that promote racial segregation, and reduces opportunities for actual contact between the races.

There are several indicators from the METCO study that point to these conclusions. The question which speaks most directly to the 50 per cent racial balance standard suggested by the Civil Rights Commission asked: "If you could be in any school you wanted, how many students would be white?" Figure 7 reports the percentage which responded in favor of 50 per cent or fewer white students. While both the control and the bused students started out fairly close together in 1968 (47 per cent and 51 per cent, respectively), two

school years later the bused students were 15 percentage points *more* in favor of attending *non-white* schools than the controls (81 per cent compared to 66 per cent), although the differential change is not statistically significant. The changes for the controls (both the panel and the full cross-sections) indicate that the black community as a whole may be changing its attitudes toward school integration, but the bused students appear to be changing at a more rapid rate. Ironically, just as white America has finally accepted the idea of school integration (Greeley and Sheatsley, 1971), blacks who begin experiencing it may want to reject it.

That these changes reflect ideological shifts is supported by Figures 8 and 9. The bused students are much more likely to support the idea of black power than the control students, going from a difference of 11 points in 1969 to 36 points in 1970. We were also able to construct a Separatist Ideology Index from responses to a series of statements about black/white relations (e.g., 1. "Most black people should live and work in black areas, and most whites should live and work in white areas." 2. "Black and white persons should not intermarry.") The scores range from 0 (anti-separatist) to 4 (pro-separatist). From 1968 to 1970 the control group barely changes, increasing from 1.4 to 1.5. The bused group, however, changed from 1.4 to 1.8—a statistically significant change of about one half a standard deviation. This is the clearest indication in our data that integration heightens black racial consciousness and solidarity.

The changes do not appear to be in ideology alone. From 1969 to 1970 the bused students reported less friendliness from whites, more free time spent with members of their own race, more incidents of prejudice, and less frequent dating with white students (Fig. 10). In other words, the longer the contact with whites, the fewer the kinds of interracial experiences that might lead to a general improvement in racial tolerance.

To what extent might these changes be a result of negative experiences with white students in the schools? We do not doubt that there has been considerable hostility shown by certain groups of white students. Nonetheless, although the evidence is not complete, what we have indicates that the white students themselves were negatively affected by the contact. Support for the busing program was generally high among white sophomores in the eight high schools studied, especially among middle-class students in the college preparatory tracks (Useem, 1972). For example, 46 per cent of all students were "very favorable" to METCO (only 11 per cent were "not favorable"); 73 per cent felt METCO should be continued; and 52 per cent agreed that there should be more METCO students (20 per cent disagreed and 27 per cent were not sure). But those students who had direct classroom contact with bused black students showed *less* support for the busing program than those without direct contact. In fact, the kind of students who were generally the most supportive —the middle-class, high-achieving students—showed the largest decline in support as a result of contact with bused black students. This finding is based on cross-sectional data and does not indicate

a change over time, but it is suggestive of the possibility that a general polarization has occurred for both racial groups.

The data from the Ann Arbor and Riverside studies give some support to these findings, although again there were no directly comparable measures. Moreover, it is unlikely that the concept of ideology is relevant to elementary students. The Ann Arbor study included a sociometric test, whereby children could indicate how much they liked each classmate. Black students at all grade levels suffered a loss of peer status when they switched from a segregated to an integrated school, although the results were statistically significant only for second and third grade girls and fourth and fifth grade boys. That is, these black children were liked less by their new white peers than by their previously all-black peers. Also, the level of acceptance was considerably lower for black students than for white students. On the other hand, the black students tended to be more positive about their white peers after integration than they were about their black peers before integration, although the changes are not statistically significant.

The Riverside data more clearly support the conclusion that integration heightens racial identity and solidarity. Data from a test in which children rate pictures of faces portraying various ethnic and racial groups showed that fewer cross-racial choices were made after integration than before integration. For example, one rating task required that the children choose the face that they would "most like for a friend." Both black and white children tended to choose their own race to a greater extent after one year of integration than before integration (Gerard and Miller, 1971). The Riverside study also concluded that these effects were stronger with increasing age; that is, the cross-racial choices declined more in the later grades than in the earlier grades.

To avoid any misinterpretation of these findings, we should caution that the measures discussed here do not necessarily indicate increased *overt* racial hostility or conflict. This may occur to some extent in many busing programs, but our impression based on the METCO program is that overt racial incidents initiated by black or white students are infrequent. The polarization that we are describing, and that our instruments assess, is characterized by ideological solidarity and behavioral withdrawal. Our inferences pertain to a lack of racial togetherness rather than to explicit racial confrontations or violence. While it is conceivable that a connection may exist between these ideological shifts and open racial conflicts, such a connection is not established by the studies reviewed.

There are two other qualifications we must place on the interpretation of these data. First, as of 1970 the *majority* of the bused METCO students still supported general integration ideology. Only 40 per cent of the METCO students would ideally prefer schools with a majority of black students (compared to 28 per cent of the controls); 60 per cent of METCO students believe that "once you really get to know a white person, they can be as good a friend as anyone else" (compared to 78 per cent of the controls); and 58 per cent of

METCO students do not agree that "most black people should live and work in black areas, and most whites should live and work in white areas" (compared to 71 per cent of the control students).

The main point we are making is that the integration policy model predicts that integration should cause these sentiments to *increase*, while the evidence shows they actually *decrease*, leaving the bused students *more opposed* to integration than the non-bused students. Only further research can determine whether this trend will continue until the majority of bused students shifts to a general anti-integration ideology.

Second, group averages tend to obscure important differences between individual students. While we do not deny the existence of racial tension and conflict for some students, other students and families (both black and white) have had very meaningful relationships with one another, relationships made possible only through the busing program. It is very difficult, indeed, to weigh objectively the balance of benefit and harm for the group as a whole. The main point to be made is that a change in a group average does not necessarily reflect a change in every individual group member.

Long-term Educational Effects

In view of the fact that most of the short-term measures do not conclusively demonstrate positive effects of busing in the area of achievement, aspirations, self-concept, and race relations, it becomes even more important to consider possible longer-term changes that may relate to eventual socio-economic parity between blacks and whites. Since no busing program has been in operation for more than seven years or so, this area, obviously, has not been studied extensively. There are, however, some preliminary findings on long-term educational effects. Specifically, two studies have investigated the effects of integration on college attendance, and some tentative conclusions have emerged.

Seniors from the 1970 graduating class in the METCO program, as well as the seniors in the 1970 control group, formed samples for a follow-up telephone interview in the spring of 1972. Approximately two thirds of both groups were contacted, resulting in college data for 32 bused students and 16 control group students. The results of the follow-up are striking and they are summarized in Figure 11. The bused students were very much more likely to start college than the control group (84 per cent compared to 56 per cent), but by the end of the second year the bused students resembled the control group (59 per cent compared to 56 per cent). In other words, the METCO program seems to have had a dramatic effect upon the impetus for college, and many more of the bused students actually started some form of higher education. But the bused drop-out rate was also substantially higher, so that towards the end of the sophomore year the bused students were not much more likely to be enrolled full-time in college than the control group.

In spite of this higher drop-out rate, the bused students were still

enrolled in what are generally considered higher-quality institutions. That, is, 56 per cent of the bused students were in regular four-year colleges, compared to 38 per cent for the control group. An even greater difference was found for those enrolled in full universities (which include a graduate school). The figures are 47 per cent and 12 per cent for bused and control students, respectively.

Similar findings emerged from a special college follow-up study of the ABC program (Perry, 1972). A group of ABC students were matched with a control group of high-ability black students not in the ABC program. Since ABC is a highly selective program, the matching was carried out so that the ABC and control groups had very similar family backgrounds, socio-economic status, and achievement levels. Approximately 40 matched pairs were followed until their first year of college (academic year 1971-72). All of the ABC students entered college, whereas only half of the control group did so. While it is too early to assess differential drop-out rates, it is very clear from the data that even if half of the ABC students drop out of college, the quality of colleges attended by the ABC students is considerably higher than those attended by the control group. Of the matched pairs attending college, two thirds of the ABC students attended higher-quality institutions.

Neither of these studies is large enough, of course, to draw any definite conclusions. But there does seem to be some strong evidence that middle-class suburban or prep schools have an important "channeling" effect not found in black schools. The effect is probably due to better counseling and better contacts with college recruiting officers. Whatever the reason, black students attending such schools may have doors opened for them that are closed to students attending predominantly black schools. Given the lack of positive effects in other areas, these findings may have great significance for future busing programs, and further research is urgently needed.

Program Support

Although it is not explicitly part of the integration policy model we are testing, it seems appropriate to consider the extent of the support for the busing program among the students and communities involved. As might be expected from the changes already described, there was a general decline in the enthusiasm for the METCO program over time, with the bused students showing greater changes than the controls: 80 per cent of the bused group said they were "very favorable" to the program in 1968, compared to 50 per cent by 1970. Yet we cannot infer from this alone that there is a decline in support for the program. The drop-out rate in the METCO program is almost non-existent in spite of some of the changes we have reported. The families involved in the program appear to feel that their children will get a better education in the suburbs in spite of the inconvenience and the problems. Our data indicated that the most important reason cited by the bused students for being in the busing program was to receive "a better education." Moreover, this did not

change as much as many of our other indicators from 1969 to 1970; 88 per cent said this was a "very important" reason in 1969, and 81 per cent indicated the same in 1970. Very few reported that "getting out of the city" or "more contact with whites" were important reasons for being in the program.

In other words, the justification of the program in the black community has little to do with the contact-prejudice components of the policy model; instead, busing is seen in the context of enlarging educational opportunities for the black students.

We do not have much systematic data from the white receiving schools other than those cited earlier (i.e., a sample of white sophomore students was generally supportive of the program in 1969). It is our impression, however, that most of the 28 communities that receive METCO students are enthusiastic about the program, and only a few communities have turned down the opportunity to participate. The other programs reviewed receive moderate to strong support from the community and participants. In Project Concern the drop-out rate was only 10 per cent, half of which was due to the program directors' initiative in withdrawing students. After two years of urban-to-suburban busing, nine additional suburban towns chose to participate and over 1,000 additional elementary school children were bused to suburban schools. In White Plains both black and white parents expressed more positive than negative attitudes about integration, although black parents were more favorable to the program than white parents after two years of desegregation. In Ann Arbor the black parents felt more positive toward the program after one year of desegregated schooling, but the children were slightly less positive than they were prior to the integration experience. In both groups, however, support was high; only 20 per cent of each group expressed negative attitudes toward the program.

We must conclude that the busing programs we have reviewed seem to have considerable support from both the black and white communities. In most cases, black parents were highly supportive of the various busing programs. Like the students in our own study, black parents stressed quality education as the most important benefit of such programs, whereas white parents in receiving schools tended to stress the experience of coming into contact with other races. We must point out, however, that *none* of the programs reviewed involved *mandatory* busing of white students into black communities; cities facing this situation might present a very different picture of white support. Moreover, it is unlikely that many in the black community have seen the data on achievement reported here; much black support may be based upon premises regarding academic gain which our findings call into question. Whether or not black support will be affected by such findings remains to be seen.

Social Class and Other Background Factors

Most of the data we have presented so far summarize the effects of busing on all students considered as a single group. A question

might be raised about whether these effects (or lack of same) are consistent for all students regardless of their background. In particular, it might be hypothesized that social class differences between black and white students can explain the changes (or lack of changes) we have reported. We shall briefly indicate the major trends for students of differing social class and other characteristics, such as sex and age level.

It is difficult to separate race and social class, since black families as a group tend to be lower than white families on most socio-economic measures. To the extent that the distinction can be made, however, no uniquely social class factors have been reported that would contradict the findings presented so far. The Riverside study selected a group of white students whose social class scores were less than or equal to the minority students; achievement test scores of the black students were still significantly lower than the low-SES white students (although the original difference was diminished somewhat; Gerard and Miller, 1971). For the METCO data, special analyses were made of the race relations changes among bused students who were children of blue-collar as compared to white-collar workers; no significant differences emerged. What small changes there were usually revealed that the black students from white-collar families changed more (in a negative direction) than those from blue-collar families.

There is also the possibility that, contrary to the assumptions behind many school integration programs, some of the predominantly white schools to which black students are sent are in fact worse than the inner-city black schools. In the METCO study there were no data to examine this issue in detail, but it is our impression that perhaps only one or two suburbs would approximate the inner-city socio-economic level. In any event, while there were some differences from one town to another in the absolute levels of the various measures, there were no important variations in the *changes* over time that appeared to be related to any socio-economic differences in the communities.

With the exception of achievement test scores, there was some sex and age differential on various measures both before and after integration; but there were no important differences in the relative *changes* in these groups due to integration. That is, in METCO we found that girls generally had a more difficult time adjusting to the program (reflected in lower program support, stronger separatist ideology, and less contact with white students). There seemed to be some important differences in cross-sex, cross-race relationships, which were better between black boys and white girls than between white boys and black girls. This situation seems to have left some black girls with resentful feelings over white girls "stealing their men." But the amount of interracial contact was small for both groups, and, more important, the *changes* in our race relations measures for bused students were about the same for both boys and girls. A similar finding emerged for age levels. Younger students were somewhat more supportive of the program and were more positive

on the various race relations measures than older students, but the degree and direction of *change* were similar for all ages. This was true for the METCO secondary school data as well as the Riverside elementary school data.

In sum, while there were some over-all differences according to the sex and age levels of students in busing programs, the effects of busing on *changes* (if any) in achievement and attitudes tended to be uniform for all groups.

It seems clear from the studies of integration programs we have reviewed that four of the five major premises of the integration policy model are not supported by the data, at least over the one- to five-year periods covered by various reports. While this does not deny the possibility of longer-term effects or effects on student characteristics other than those measured, it does mean that the model is open to serious question.

The integration policy model predicted that achievement should improve as black students are moved from segregated schools to integrated schools. This prediction was based in part upon the classical works of Kenneth Clark and others which argue that, because of segregation, black students have lower regard for themselves. It was also based in part upon reanalyses of the Coleman data which showed that black students achieve less than white students, but that black students in integrated schools achieve more than black students in segregated schools. But four of the five studies we reviewed (as well as the Berkeley and Evanston data discussed in footnote 4) showed no significant gains in achievement scores; the other study had mixed results. Our own analyses of the Coleman data were consistent with these findings (see Armor, 1972).

Although there were no gains in general standardized achievement scores that we might attribute to integration, neither were there any losses for black or white students. Unfortunately, we cannot say the same about academic grades of black students. The grades of the METCO secondary students in suburban schools dropped considerably. We did not measure the bused students' grades before they entered the program, but the fact that their test scores are somewhat *higher* than the control group's offers substantial evidence that this difference does represent a change. Along with this change we observed a difference in academic self-concept that seems to indicate that the bused students are aware that they are experiencing more difficult competition in the suburbs. While we might expect this result if we believe the Coleman finding of black/white achievement differences, it does not mean there is no problem. It is possible that there are psychological consequences of this increased competition that may be harmful to black children. Being moved from an environment where they are above average to one in which they are average or below may be frustrating and discouraging. It might be one of the reasons why the bused black students have become less supportive of the program and more supportive of black separatism.

We tested this latter possibility by examining the relationship

between support for the Black Panthers and academic grades in our 1970 sample from METCO (see Fig. 12). Consistent with our findings, the bused students are more favorable to the Panthers than the control group. But among the bused students we find that the METCO group which has college aspirations but which has a C average or below stands out clearly as more pro-Panther than the other groups. In other words, the increased militancy and anti-integration sentiments among the bused students may arise partly from the fact that their aspirations remain at a very high level even though their performance declines to the point where they may question their ability to compete with whites at the college level. The fact that this group is proportionally a large one (about 25 per cent of the total bused group compared to 13 per cent for the analogous control group) may be an indication of a potentially serious problem.

The integration policy model predicted that integration should raise black aspirations. Again, our studies reveal no evidence for such an effect. Unlike poor achievement, however, low aspirations do not appear to be much of a problem. The black students in our busing program seem to have aspirations as high as or higher than white students. If anything, given their academic records in high school, these aspirations may be unrealistic for some students. The emphasis on equality of educational opportunity may be pushing into college many black students whose interests and abilities do not warrant it. The fact that only half of the 1970 METCO seniors are still enrolled in four-year colleges (after over 80 per cent had started) may attest to this possibility.

The integration policy model predicted that race relations should improve as the result of interracial contact provided by integration programs. In this regard the effect of integration programs seems the opposite of that predicted. It appears that integration increases racial identity and solidarity over the short run and, at least in the case of black students, leads to increasing desires for separatism. These effects are observed for a variety of indicators: attitudes about integration and black power; attitudes towards whites; and contact with whites. The trends are clearest for older students (particularly the METCO high school students), but similar indications are present in the elementary school studies as well. This pattern holds true for whites also, insofar as their support for the integration program decreases and their own-race preferences increase as contact increases.

It is this set of findings that surprised us most. Although many recent studies have questioned the meaning of black/white differences in achievement and aspirations, to our knowledge there have been no research findings which challenged the contact theory. The idea that familiarity lessens contempt has been a major feature of liberal thought in the western world, and its applicability to racial prejudice has been supported for at least two decades of social science research. It may be true that, under certain conditions, greater contact will lead to a reduction of prejudicial feelings among racial or ethnic groups. But the induced integration of black and white

students as it is being carried out in schools today does not fulfill the conditions.

In all fairness to the Allport contact theory, it must be said that he placed many qualifications upon it. One *major* qualification was that the contact must be made under equal-status conditions. Many behavioral scientists might assume that an integration program presumes equality of status, at least in the formal sense that all races are treated equally and have equal access to educational resources. But there is another way to look at status. Integrating black and white students does very little, in the short term, to eliminate the *socio-economic* and *academic* status differentials between black and white students that exist before integration. Therefore, we have to question whether integration programs for black and white children fulfill the equal-status conditions as long as socio-economic and academic inequalities are not eliminated. Allport warned that contact under the wrong conditions can reinforce stereotyped beliefs rather than reduce them; this may be occurring in our current integration programs. In other words, the social class differences between blacks and whites—the differences that integration programs are supposed to eliminate eventually—may heighten the sense of black identity and solidarity, leading to an increasing opposition to integration.

What Allport did not say, but what his emphasis on equal-status conditions may imply, is that contact between two groups with strong initial prejudices may increase prejudice to the extent that stereotypes are reflected by actual group differences. For black students, initial stereotypes about white students as snobbish, intellectual, and "straight" may be partially confirmed by actual experience; the same may be true for white stereotypes of black students as non-intellectual, hostile, and having different values. We might make the same observations about some of the other ethnic and religious conflicts we see in the world today, particularly the Protestant-Catholic conflict in Northern Ireland and the Israeli-Arab battles in the Middle East. It is certainly true in these cases that the amount of contact has not lessened the hostilities; it seems to have heightened them to dangerous levels in the first place.

Why has the integration policy model failed to be supported by the evidence on four out of five counts? How can a set of almost axiomatic relationships, supported by years of social science research, be so far off the mark? Part of the reason may be that the policy model has failed to taken into account some of the conditions that must be placed upon contact theory; but we believe that there may be other reasons as well having to do with (1) inadequate research designs, (2) induced versus "natural" factors, and (3) changing conditions in the black cultural climate.

Most of the methodological procedures which have been used to develop various components of the integration policy model are not adequate. The single most important limitation is that they have been cross-sectional designs. That is, the studies have measured

aspects of achievement or race relations at a single point in time, with causal inferences being drawn from comparisons of integrated groups with segregated groups. Such inferences are risky at best, since the cross-sectional design cannot control for self-selection factors. For example, the Coleman study showed that integrated black students had slightly higher achievement than segregated students, but it is more than likely that families of higher-achieving students move to integrated neighborhoods in the first place (for reasons of social class or other issues involving opportunity). Thus the cause-and-effect relationship may be the opposite to that suggested by the U.S. Civil Rights Commission report. In the Deutsch and Collins housing study, which found that integrated whites were more tolerant of blacks than segregated whites, it is possible that self-selection factors were operating which led the more tolerant white persons to choose the integrated housing project in the first place. It is fair to say that none of the studies before the ones we have reviewed had an opportunity to study the effects of large-scale induced integration over a reasonable period of time. Yet this is the only way the effects of integration can be sorted out from differences which may originally exist between any two groups of persons.

The second reason for our findings in the race relations realm may have to do with the relatively contrived nature of current school integration programs. In all of the programs reviewed, the integration has been induced by the actions of state or local agencies; it has not occurred in a more natural way through individual voluntary actions. The use of busing, the relatively instantaneous transition from an all-black to an all-white environment, the fact of being part of a readily identifiable group in a new and strange setting, may all combine to enhance racial solidarity and increase separatist tendencies for black students. (We might find a very different picture for black families that move into predominantly white neighborhoods and allow their children some time to adjust to the new environment.) On the other hand, this set of mechanisms would not explain why white student attitudes in the receiving schools also tended to become less favorable to black students, as shown in the Ann Arbor, Riverside, and METCO studies. Moreover, these mechanisms—if they are, in fact, operating—do not invalidate our evaluation of those current policies that focus precisely on induced school integration.

The final major reason why the integration policy model may fail is that the racial climate has changed drastically in the years since the Allport work and the Supreme Court decision. The most noteworthy change, of course, has been in the attitudes of black people. Although the majority of blacks may still endorse the concept of integration, many younger black leaders deemphasize integration as a major goal. Black identity, black control, and black equality are seen as the real issues, and integration is regarded as important only insofar as it advances these primary goals. Some black leaders, albeit the more militant ones, feel that integration might actually defeat attainment of these goals by dispersing the more talented blacks

throughout the white community and thereby diluting their power potential. Integration is also seen as having white paternalistic overtones and as the means whereby the white man allays his guilty conscience while ignoring reform on the really important issues. Given these sentiments, school integration programs are seen by blacks not as a fulfillment of the goal of joining white society, but only as a means of obtaining better educational opportunities, which would ultimately lead to a more competitive position in the occupational and economic market.

Integrated schools *per se* are not the real issue; if schools in the black community provided education of the same quality as those in white communities, blacks would not be so interested in busing programs. In fact, when we asked students in the METCO program this question, almost 75 per cent said they would prefer to attend their own community school if it were as good as the suburban schools. Of course, it is by no means clear that the suburban schools actually offer better education. Any improvement in facilities or teacher quality (the ultimate importance of which is called into question by the Coleman report) may be counteracted, as our data show, by stiffer competition and a more hostile and unfriendly student atmosphere. Black leaders who view school integration only as a means to better opportunity must take these other factors into account.

In the context of these new black attitudes, the Allport model may not be applicable, and contact with white students provided by induced school integration may enhance ideological tendencies towards separatism. The reality of contact seems to sensitize black students to the heightened racial identity and separatism that has been growing in the black community since the late 1960's. The explanation may be, in part, that the large socio-economic differences between black and white students are fully recognized only when contact enables them to witness these differences. The difficulty of bridging this gap, coupled with the knowledge that they are viewed by whites as having lower status, leads black students to reject white standards and relationships. They turn inward, as it were, stressing the uniqueness and value of their own race, shutting off contact with whites, and embracing a point of view which endorses separatism as a means toward preserving and elevating their own position. Those black students not in contact with whites may exhibit some of these tendencies due to the over-all contact with white society, but the lack of direct contact postpones the problem or avoids it altogether. This type of "contact-conflict" model may be used to explain the conflicts which occur between two different cultural groups which come into direct contact (e.g., Catholics and Protestants in Northern Ireland; Israelis and Arabs in the Middle East). Whether or not it is applicable on a larger scale, it would fit the data better and would provide a more realistic model for the school integration case.

It would be a mistake, of course, to view the increased racial solidarity of black students as a completely negative finding. The differences between black and white cultures make a certain amount of culture conflict inevitable and even necessary if an integrated

society is to be realized. In fact, it would be reasonable *not* to expect conflict—which always accompanies the contact of two cultures—only if we did not believe that a distinct black culture exists in America. Although this belief was held at one time by a large number of social scientists, it is not so popular today. There is now growing recognition that a black culture does exist, at least in the eyes of many blacks, and that this culture stresses values, goals, and behavioral patterns that differ considerably from those of the predominant white culture (Jones, 1972; Metzger, 1971).

Up to this point, we have said little about the one positive finding of our research, the "channeling" effect whereby black students who attend white middle-class schools tend to get into higher quality colleges (even though they may not finish college at a higher rate than segregated black students). This finding should be heartening to those who have believed that integration does provide educational opportunities not found in inner-city black schools, although the finding must be considered a tentative one since it has been shown in only two fairly small studies. Also, the positive effects are limited to the college-bound, so that there still may be a question about the benefits of integration for the non-college-bound black students. And it may be that the "channeling" effect works only when the number is relatively small. Nonetheless, this kind of longer-term effect—and perhaps others as yet undiscovered—may turn out to provide a basis for certain types of integration plans.

Policy Implications

It is obvious that the findings of integration research programs have serious implications for policy. Given the momentum which has built up over the last few years for the school integration movement, however, it is likely that in some quarters the data we have presented will be attacked on moral or methodological grounds and then summarily ignored. In other quarters the data may be met with rejoicing over the discovery of a club which can be used to beat back the pro-integration forces. But we hope these extreme reactions will be avoided and that a more balanced interpretation of our findings will prevail.

The most serious question is raised for mandatory busing (or induced integration) programs. If the justification for mandatory busing is based upon an integration policy model like the one we have tested here, then that justification has to be called into question. The data do not support the model on most counts. There may be justifications for school integration other than those in the integration policy model, but then the burden must fall upon those who support a given school integration program to demonstrate that it has the intended effects (with no unintended, negative side-effects). It also must be demonstrated that any such program is at least supported by the black community.

We want to stress this last point. Decisions must be based upon feelings of the black community as well as the white community.

Many liberal educators have been so intent on selling integration to reluctant white communities that they risk the danger of ignoring the opinion of the black community. While many black leaders favor school integration, there are also many black persons who would much prefer an upgrading of schools in their own community. The recent (March 1972) National Black Political Convention in Gary, Indiana, condemned mandatory busing and school integration, arguing that such plans are racist and preserve a black minority structure. These views may not represent the entire black community, but they are indicative of the complexity and heterogeneity of black political opinion.[13] Whether or not a white community wants integration (and there are obviously many that do not), we must take into account the feelings of the group on whose behalf integration is advocated.

Although the data may fail to support mandatory busing as it is currently justified, these findings should not be used to halt voluntary busing programs. For one thing, we have stressed that the studies of integration so far have been over fairly short periods (one to five years), and there are possibilities of longer-term effects which are not visible until adulthood (not to speak of effects on characteristics not measured by the present research). More important, however, we have tentatively demonstrated one very significant longer-term benefit of integration for college-bound blacks. The "channeling" effect, if substantiated by further research, could form a substantial basis for voluntary programs whose focus is upon the college-bound black student. Even for this subgroup, of course, we have documented the trend towards separatist ideology. But the gain in educational opportunity may well outweigh this consequence in the eyes of the black community, as indeed it does now for programs like METCO. In fact, some persons will view these ideological changes, as well as any conflict that may accompany them, as an inevitable consequence of contact between two different cultures. If blacks and whites are ever to live in an integrated culture, they must begin learning and accepting their differences; and this cannot happen without contact. If contact engenders a certain amount of racial friction, many persons will feel the gains from school integration—both long-term and symbolic—more than make up for it.

To these questions of the symbolic and long-run benefits of induced school integration, the existing studies provide no answer. What they do show is that, over the period of two or three years, busing does *not* lead to significant measurable gains in student achievement or interracial harmony (although it does lead to the channeling of black students to better colleges). The available evidence thus indicates that busing is *not* an effective policy instrument for raising the achievement of black students or for increasing interracial harmony. On the other hand, the existing studies do not rule out the possibility that in the longer run, or in other respects, busing may indeed prove to have substantial positive consequences.

The available evidence on busing, then, seems to lead to two clear policy conclusions. One is that massive mandatory busing for pur-

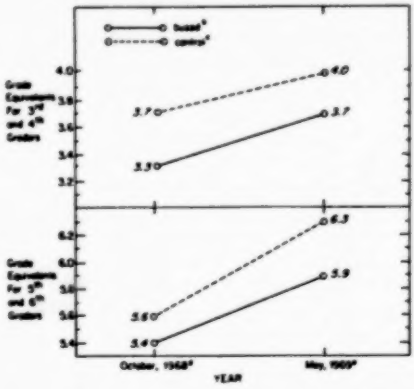
poses of improving student achievement and interracial harmony is not effective and should not be adopted at this time. The other is that *voluntary* integration programs such as METCO, ABC, or Project Concern should be continued and positively encouraged by substantial federal and state grants. Such voluntary programs should be encouraged so that those parents and communities who believe in the symbolic and potential (but so far unconfirmed) long-run benefits of induced integration will have ample opportunity to send their children to integrated schools. Equally important, these voluntary programs will permit social scientists and others to improve and broaden our understanding of the longer-run and other consequences of induced school integration. With a more complete knowledge than we now possess of this complicated matter, we shall hopefully be in a better position to design effective public education policies that are known in advance to work to the benefit of all Americans, both black and white.

Even in voluntary school integration programs, however, our data indicate that certain steps should be taken which might help alleviate the problems of achievement and race relations. Wholesale integration without regard to achievement levels of white and black students can lead to potentially frustrating experiences. Some selectivity might be desirable so that both groups reflect a similar achievement capacity. Although a certain amount of racial problems may be inevitable, full education of both groups about the possibilities and causes of differences might ameliorate the kind of polarization that would endanger the program.

One must also consider the possibility that other types of integration programs may be more successful. We have said since the outset that our data do not necessarily apply to neighborhood integration brought about by the individual choice of black families. It is possible that such programs would be more successful over the long run, at least in terms of race relations. Being a member of the community might tend to ameliorate black feelings of separateness that are fostered in the relatively contrived busing situation. Whether or not this kind of program could also change standardized achievement levels remains to be seen. Since the differences between black and white achievement are so large and consistent across so many different settings and studies, we must entertain the possibility that no plan of school integration will lessen this gap. Research will have to be continued in this area before the full causal mechanisms are understood and a firm basis is established on which social action can accordingly be planned.

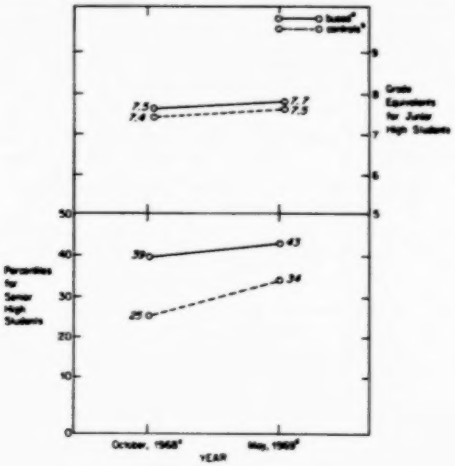
Although we have been critical of some aspects of the connection between social science and public policy in the integration movement, we do not want to imply that their connection should be lessened. On the contrary, the real goals of social science and public policy are not in opposition; the danger is rather that the connection may not be close enough to enable us to make sound decisions. Society can only benefit by those ties which combine the advantage of scientific knowledge with a clear awareness of its limitations.

FIGURE 1. *Reading Achievement—Elementary.*[a]



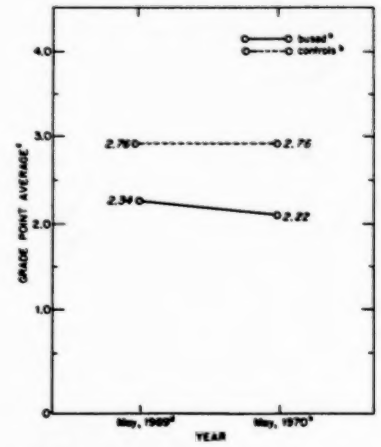
[a]Metropolitan Achievement Tests; no statistically significant gains when bused compared to controls for either age group.
[b]N=88 for Third-Fourth graders and 59 for Fifth-Sixth graders.
[c]N=14 for Third-Fourth graders and 27 for Fifth-Sixth graders.
[d]Full cross-sections for grades:
3-4: bused 3.4 (N=131); control 3.7 (N=38)—not significant (sd= .96)
5-6: bused 5.5 (N=90); control 5.4 (N=55)—not significant (sd=1.5).
[e]Full cross-sections for grades:
3-4: bused 3.7 (N=111); control 3.8 (N=23)—not significant (sd=1.1)
5-6: bused 6.0 (N=74); control 5.8 (N=52)—not significant (sd=1.7).

FIGURE 2. *Reading Achievement—Junior and Senior High.*



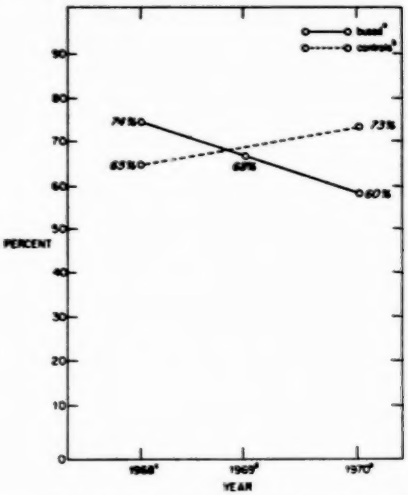
[a]N=123 for junior high and 72 for senior high (no statistically significant changes).
[b]N=27 for junior high and 14 for senior high (no statistically significant changes).
[c]Full cross-section for junior high: bused 7.5 (N=197); control 7.4 (N=74)—n. s. (sd=1.9)
Full cross-section for senior high: bused 38 (N=160); control 28 (N=35)—n. s. (sd=24).
[d]Full cross-section for junior high: bused 7.7 (N=143); control 7.3 (N=47)—n. s. (sd=1.9)
Full cross-section for senior high: bused 44 (N=86); control 34 (N=20)—n. s. (sd=25).

FIGURE 3. *Grade Point Average—Junior and Senior High.*



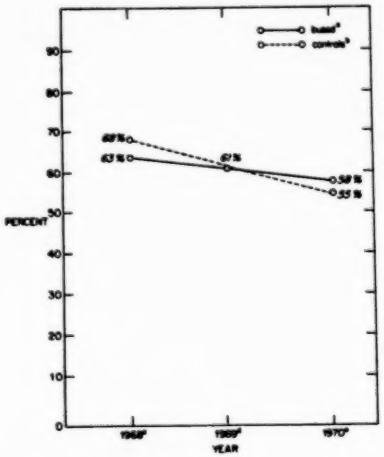
[a]N=165; statistically significant change (.01 level).
[b]N=23; no significant change.
[c]Self-reported; a grade of A is 4.0, B is 3.0, etc.
[d]Full cross-section: bused 2.33 (N=210); control 2.73 (N=59)—significance at .001 level.
[e]Full cross-section: bused 2.20 (N=467); control 2.59 (N=228)—significance at .001 level.

FIGURE 4. *Per Cent Wanting a Bachelor's Degree.*



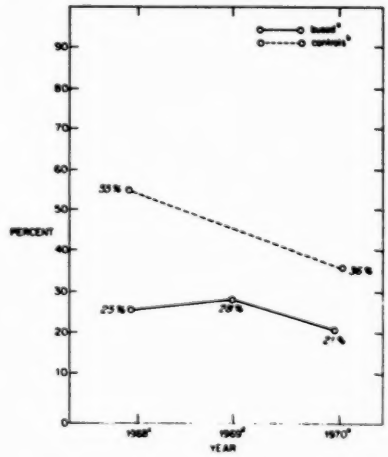
[a]N=132; bused changes significantly different from control changes (.02 level).
[b]N=34.
[c]Full cross-section: bused 71% (N=323); controls 68% (N=87) -not significant.
[d]Full cross-section: bused 69% (N=211); controls 68% (N=60)—not significant.
[e]Full cross-section: bused 60% (N=486); controls 56% (N=228)—not significant.

FIGURE 5. *Per Cent Expecting a Professional or Technical Occupation.*



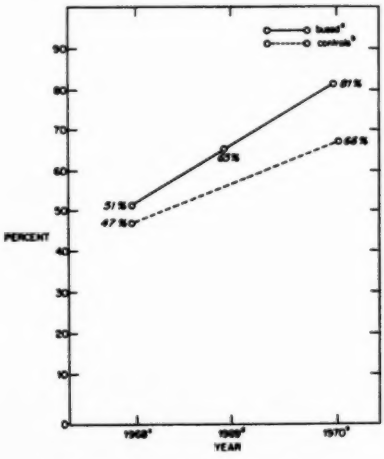
[a]N=130; bused changes not significantly different from control changes.
[b]N=31.
[c]Full cross-section: bused 63% (N=311); controls 55% (N=91)—not significant.
[d]Full cross-section: bused 62% (N=203); controls 52% (N=58)—not significant.
[e]Full cross-section: bused 66% (N=482); controls 66% (N=228)—not significant.

FIGURE 6. *Per Cent Feeling More Intelligent than Classmates.*



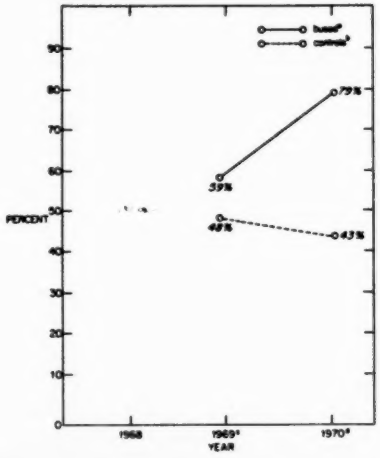
[a]N=130; bused changes not significantly different from control changes.
[b]N=33.
[c]Full cross-section: bused 25% (N=320); controls 47% (N=99)—significance under .01.
[d]Full cross-section: bused 31% (N=211); controls 42% (N=60)—not significant.
[e]Full cross-section: bused 23% (N=483); controls 34% (N=230)—significance under .01.

FIGURE 7. *Per Cent Wanting to be in a School with no More than 50 Per Cent White Students.*



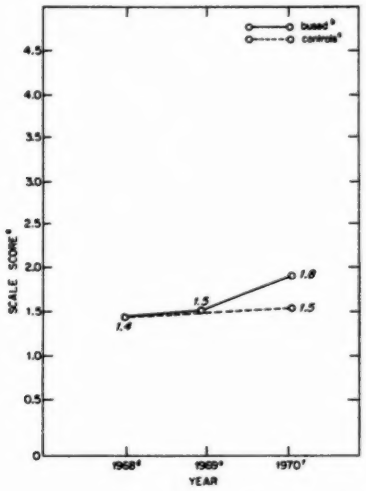
[a]N=133; bused change not significantly different from control change.
[b]N=36.
[c]Full cross-section: bused 56% (N=323); controls 56% (N=97).
[d]Full cross-section: bused 67% (N= 209); controls 59% (N=61)—not significant.
[e]Full cross-section: bused 71% (N=485); controls 62% (N=229)—significance under .001.

FIGURE 8. *Per Cent Favoring Black Power.*



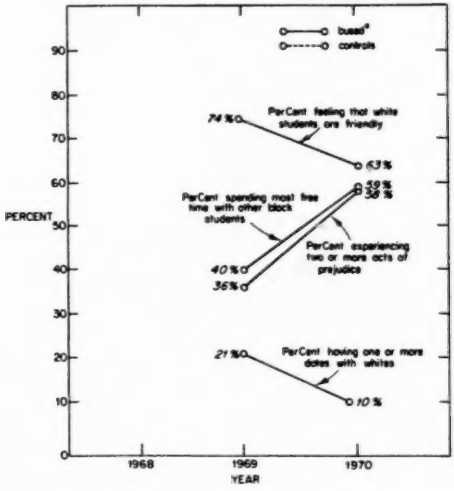
[a]N=167; bused change significantly different from control change (.05 level).
[b]N=21.
[c]Full cross-section: bused 59% (N=211); controls 52% (N=59)—not significant.
[d]Full cross-section: bused 76% (N=479); controls 55% (N=220)—significance under .001.

FIGURE 9. *Separatist Ideology Index.*



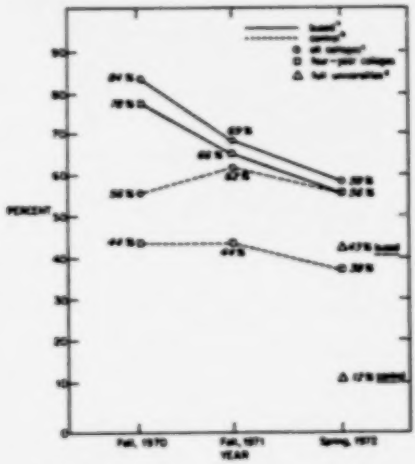
[a]A score of 4 indicates strongest separatist feelings; reliability = .76; sd = .8.
[b]N=135; bused change significantly greater than control change (under .01 level).
[c]N=34.
[d]Full cross-section: bused 1.4 (N=324); control 1.4 (N=97)—not significant.
[e]Full cross-section: bused 1.8 (N=213); control 1.5 (N=60)—not significant.
[f]Full cross-section: bused 1.8 (N=489); control 1.5 (N=230)—significance under .001.

FIGURE 10. *Bused Students Relations with White Students.*



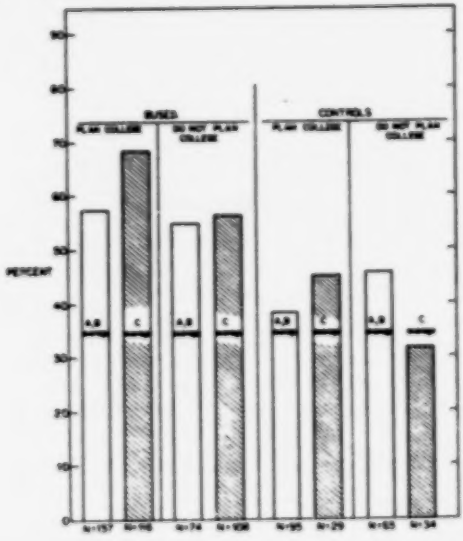
[a]N's range from 146 to 159; all changes significant at or under .02 level.

FIGURE 11. *Per Cent Attending College Full-time.*



[a]N=32 for all time periods.
[b]N=16 for all time periods.
[c]Includes 2-year junior college; bused change significantly greater than control change (.05 level).
[d]Universities with a graduate program.

FIGURE 12. *Percentage of Bused and Control Students Who Sympathize with the Black Panthers, by College Plans and Academic Performance.*



FOOTNOTES

[1]In spite of these precautions, we must still warn that it is difficult to make comparisons and generalizations when data are derived from different studies. Also, all of the studies we review were done in Northern cities, so that our findings may not be generalizable to the South. Nonetheless, the studies do reveal sufficiently clear and consistent findings in certain areas to enable at least a preliminary assessment of the effects of induced integration in de facto segregated cities of the North.

[2]The data summarized in the reports cited were subjected to extensive reanalysis for the present study.

[3]The number of junior and senior high students participating in the METCO study are as follows: wave one, 357 bused (80 per cent of the total population) and 112 controls (54 per cent of the eligible population); wave two, 229 bused (51 per cent) and 67 controls (32 per cent); wave three, 492 bused (87 per cent) and 232 controls (65 per cent). Because of clerical errors in relating achievement tests to questionnaires, the questionnaire data for waves one and two are based on about 10 per cent fewer respondents in each group. Given the low turnout rates for wave two and other factors (drop-outs, graduates, transfers from control to bused status), our panel of secondary school students with achievement data for both testing periods consists of 195 bused students and 41 control students; for the questionnaire data the panel consists of 135 bused students with data from all 3 waves and 36 control students with data from wave one and wave three. (Only 16 students in the control group had questionnaire data from all three waves. Of the initial sample of control students, over a third had either graduated or transferred into the busing program by the third wave.) In addition, achievement data for elementary grades is available for panels of 147 bused students (66 per cent of the wave one sample) and 41 controls (44 per cent). Given the relatively small proportion of both bused and control students in the panels, there is the chance that the panels are not representative of the full population of bused students and their matched siblings. In the comparisons we make in the next section, therefore, we shall also present data from the complete cross-sections for all waves. The bused panel does not differ significantly from the full cross-section of bused students, and the control panel differs in no way that would affect our main conclusions. In other words, the cross-sectional data can be used as a check on the panel data; the absence of any divergence between the two sets of findings indicates that the attrition of the panels does not invalidate the panel findings. (Analysis was carried out on the 240 bused students who were in both waves one and three, representing 74 per cent of the wave one sample, and there were no important differences between these results and the results from the smaller three-wave panel.)

[4]Research reports for a number of widely-discussed busing programs were not included for various reasons. For example, the Berkeley, California, busing program has not been systematically studied; a report is available, however, which shows that black student achievement is as far behind (or *further* behind) white achievement after two years of integration as before integration (Dambacher, 1971). A study of the Rochester busing program also lacked a proper pre-test design (Rochester City School District, 1970). The study had pre-test and post-test achievement scores from *different tests*, and control groups with generally lower pre-test scores; and it used analysis of covariance to make adjustments for post-test scores. Such statistical adjustments do not necessarily eliminate initial differences between the bused and control groups. A third study—of the Evanston integration program—was received too late for inclusion (Hsia, 1971). This report did show, however, that after two to three years of integration, integrated black students were still as far—or farther—behind white students as before integration. This research also confirmed the reduction in black academic self-concept after integration and the tendency for black student grades to decline. We know of no other studies of induced school integration in the North which have the research design necessary for establishing cause and effect relationship—to wit, a longitudinal design with a control group.

[5]About half of the elementary students and two thirds of the secondary students

were new to the program in 1968. However, there were no differences in gain scores for the newly-bused compared to the previously-bused students.

[6]Initial differences between the newly-bused and the previously-bused revealed no particular pattern; for third and fourth graders the previously-bused were higher by .15 points, but for fifth and sixth graders the newly-bused were higher by .5 points; in any event there were no statistically significant differences in gain scores.

[7]The newly-bused students were somewhat higher than the previously-bused initially for both junior and senior high students (.3 and 2.5, respectively), but the differences were not significant.

[8]The control school was a "naturally" integrated school with an increasing proportion of black students; it was scheduled to be closed down the following year.

[9]The pattern of black achievement falling further behind white achievement at later grade levels has been extensively documented (Coleman, 1966; Rosenfeld and Hilton, 1971).

[10]Even these two significant results might not have occurred if the data had been analyzed differently. The author controlled for pre-busing scores using analysis of covariance rather than analyzing gain scores (see footnote 4). Since the author did not present pre-test means, we cannot know if the bused and control groups differed initially.

[11]The grade-point system used here has an A as 4 points, B as 3 points, and so on.

[12]The Ann Arbor study did include a measure of occupational aspiration, but the variation was so great (not to speak of the coding problems presented by such choices as "superman" and "fairy princess") that interpretation was difficult.

[13]A recent Gallup Poll reported that 48 per cent of a national non-white sample are opposed to busing for racial balance; 43 per cent were in favor, and 11 per cent were undecided (August 1971).

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CURRENT READING

Coleman on "The Coleman Report"

The following letter, by Professor James Coleman, was sent to the *New York Times* on April 13th. The *Times* having failed to find space for it, we are here inserting it into the public record of the debate on busing and school integration:

Dear Sirs:

Although I make it a practice to stay away from reporters, some statements of mine were printed in Sunday's (April 9) *Times*. I want to clarify several things concerning the findings of the so-called "Coleman Report," and the use of those findings by governmental institutions, including the courts:

1. The Report found, as I have testified in various court cases, and as has been confirmed by numerous further analyses of those same data, that the academic achievement of children from lower socio-economic backgrounds (black or white) was benefited by being in schools with children from higher socio-economic backgrounds (black or white).

2. This achievement increment is not nearly sufficient to overcome the educational disadvantage of children from lower socio-economic backgrounds.

3. This effect, however, was greater than those of other school resources of the kind ordinarily added by compensatory programs. The effects of these resources on achievement can hardly be found at all.

My opinion, with which others who have more experience in constitutional law than I may disagree, is that the results stated in 1 and 3 above have been used inappropriately by the courts to support the premise that equal protection for black children is not provided unless racial balance is achieved in schools. I believe it is necessary to recognize that equal protection, in the sense of equal educational opportunity, cannot be provided by the State. Most of the inequality of opportunity originates in the home, through loving care and attention by parents—but differential care and attention, since parents differ—and the State can hope only to add opportunity in such a way that these inequalities are not increased but reduced. This does mean, of course, that actions of the State that have increased racial or socio-economic segregation

should be corrected by the courts, but not on the mistaken assumption that they are thereby creating equal educational opportunity.

While the issue of racial integration in schools does not, I believe, involve constitutional questions of equal protection for black children conditional upon increased achievement in integrated schools, it is a matter on which school boards and governmental authorities have a responsibility to take affirmative action—action with a less punitive and blunt quality than some court decisions, but affirmative action nevertheless. In the past 20 years, there has been an increasing self-segregation into homogeneous communities by those families that have greatest freedom to move. The result is an increasing social and economic segregation in the schools, which makes a mockery of the classic American conception of the common school attended by children of all social groups.

Probably the most cogent recent statement on this issue is that made by the New York Board of Regents on March 24, in reaffirming its stand on school integration. The Board of Regents did not mention constitutional equal protection of black students because of greater achievement in integrated schools, but said rather, "This Board cannot foresee any but the most sullen and corrosive scenarios of the future if the multicolored and multicultured children of this state and nation are not permitted to get to know one another as individuals."

JAMES S. COLEMAN
Professor of Social Relations

Situation Normal: Paranoia Steady

The *Los Angeles Free Press*, a so-called "underground newspaper," runs a regular service to its readers called "Dope Scoreboard," a kind of consumer's report on the drug market. In the April 28th issue, there is the following entry on "speed":

> SPEED: Mini-whites are becoming scarcer. No bad reactions reported this week, except usual speed symptoms—paranoia, etc.

The Bewildering Five Per Cent

The Opinion Research Corporation, of Princeton, New Jersey, in the course of a poll on attitudes toward automobile accidents, asked the following question:

> I'd like your views on this auto accident case: Suppose you are driving within the speed limit on the right side of the road. A car coming in the opposite direction crosses over into your lane and crashes into your car and you are injured. Who would be at fault, you or the other driver?

One is not surprised that 95 per cent found the other driver at fault. But four per cent answered "don't know" and one per cent blamed themselves! That makes five per cent of the American population which is guilt-ridden beyond all reason, or utterly irrational, or utterly mischievous in responding to opinion polls, or—what?

FILE COPY

JAN 22 1973

MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-677

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, *et al.*,

Petitioners,

vs.

DEBORAH A. NORTHCROSS, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Statute:

Education Amendments of 1972, §718 21

In the

Supreme Court of the United States

October Term, 1972

No. 72-677

Board of Education of the Memphis City Schools, *et al.*,

Petitioners,

vs.

Deborah A. Northcross, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

Since the filing of the Petition, the opinion of the Court of Appeals has been reported at 466 F.2d 890, and the April 20, 1972 opinion of the District Court at 341 F. Supp. 583. The unreported District Court opinion of December 10, 1971 is reprinted at pp. 1a-26a of the Appendix to the Petition.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether Petitioners established as a factual matter that the present school segregation in Memphis is entirely unrelated to the past policies of discrimination and segregation carried out by the Board of Education. (The findings below that Petitioners had failed to do so are not clearly erroneous).

2. Whether the modest, interim desegregation steps ordered implemented by the District Court are so fiscally and educationally burdensome as to exceed the limits of practicability and feasibility enunciated in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). (The findings below that Plan A is within the present means of the Board of Education are not clearly erroneous, and the District Court has demonstrated its willingness to modify its Order upon a showing of actual hardship).

3. Whether the Court of Appeals erred in instructing the District Court to develop and approve a plan of complete desegregation for Memphis. (The District Court's Order left 68,699 students in virtually one-race schools because "[t]he practicalities of the existing situation in the City of Memphis limit the change in the plan of desegregation to this extent at the present time").

Statement of the Case

This matter was last before this Court in 1970, *Northcross* v. *Board of Educ. of Memphis*, 397 U.S. 232 (1970). A detailed history of the proceedings since this Court's decision is appended hereto as Appendix A, but the events may be briefly summarized as follows:

In 1971, the United States Court of Appeals for the Sixth Circuit remanded this case to the District Court

to reexamine the plan of desegregation then in operation in accordance with the principles of this Court's decisions in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Comm'rs*, 402 U.S. 33 (1971). The District Court subsequently authorized and directed representatives of the United States Department of Health, Education and Welfare to assist the school board and the Court in devising a desegregation plan for Memphis which complied with *Swann*.[1]

In conferences with the District Court and counsel for the parties, members of the team of educators designated by H.E.W. raised questions concerning the scope of the plan required in accordance with *Swann*, and the District Court scheduled an evidentiary hearing to resolve these issues, and to provide guidance for the H.E.W. team.

One issue described by the District Court's September 28, 1971 "Order Pertaining to Hearing" was as follows:

> 2. Are the one race schools, or virtual one race schools, genuinely non-discriminatory; that is, are they not the result of present or past discriminatory action on the part of the defendants or their predecessors?

Plaintiffs contended that *Swann* required desegregation of all Memphis schools unless impracticable; but the Board of Education claimed *all* of its school segregation—except that at three schools—bore no relation to the maintenance of the dual system but resulted solely from racially segregated housing patterns to which neither it nor other State agencies had contributed. Evidence at the Fall, 1971 hearing therefore did focus upon residential patterns in Memphis, and the actions of the School Board and other State

---

[1] *See Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 290, 292 (1970) (Mr. Justice Harlan, concurring).

agencies which contributed to the establishment of those patterns.

At the conclusion of the hearing, the District Court ruled that the Board had failed to prove its claims:

> In regard to the over-all issue of one-race schools, this Court concludes that the proof establishes that the defendant Board and its predecessors have played a significant role in establishment of the present large number of one-race schools which have resulted from discrimination by numerous persons and groups.

The Court set forth criteria to be employed in the preparation of two alternative plans (subsequently identified as Plan A and Plan B) by the HEW-designated team.

When the HEW team withdrew from the case, the District Court required the school board to assume responsibility for the submission of the plans; a hearing on their sufficiency and on an alternate plan presented by the plaintiffs was conducted in the Spring of 1972, resulting in the April 20, 1972 district court decision requiring implementation of "Plan A" (which achieves less desegregation than "Plan B" and far less than plaintiffs' plan) for the 1972-73 school year. Because that order was stayed by the Court of Appeals between June 2 and the date its decision was rendered, August 29, 1972, the effective date of implementation for Plan A was advanced to the second semester of the current school year.[2]

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[2] In addition, following a hearing in the Fall of 1972, the District Court further postponed implementation of the high school portion of Plan A until the 1973-74 school year in response to Petitioners' contentions that midyear implementation on the high school level was impracticable.

Reasons Why the Writ Should Be Denied

During this Term, this Court has already considered and denied petitions for review of school desegregation orders filed by at least eight school boards,[3] but probably none had as little merit as this one. Petitioners seek to convey to the Court the completely erroneous impression (1) that the District Court required desegregation of a school system about which there was no proof except that it had racially segregated housing; (2) that the District Court recklessly overrode compelling evidence that enormous expense and undisputed educational disruption would result from the desegregation it was requiring; and finally, (3) that the Court of Appeals acted on its own initiative to compel further "racial balancing" in the future even though the District Court viewed its Order as accomplishing a complete discharge of the school authorities' constitutional obligations. Any resemblance between Petitioners' description of the case and what actually transpired below seems completely fortuitous.

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[3] *Washington Parish School Bd.* v. *Moses*, 41 U.S.L.W. 3274 (Nov. 13, 1972); *Jefferson Parish School Bd.* v. *Dandridge*, 41 U.S.L.W. 3253 (Nov. 6, 1972); *County Bd. of Educ.* v. *Acree*, 41 U.S.L.W. 3274 (Nov. 13, 1972); *Colquitt County Bd. of Educ.* v. *Harrington*, 41 U.S.L.W. 3207 (Oct. 16, 1972); *Board of Educ.* v. *Brown*, 41 U.S.L.W. 3253 (Nov. 6, 1972); *Potts* v. *Flax*, 41 U.S.L.W. 3274 (Nov. 13, 1972); *Metropolitan County Bd. of Educ.* v. *Kelley*, 41 U.S.L.W. 3254 (Nov. 6, 1972); *Board of Educ.* v. *Dowell*, 41 U.S.L.W. 3313 (Dec. 4, 1972).

I

The Desegregation Orders of the Courts Below Are Grounded Upon Findings of Discrimination by School Authorities.

Petitioners say that

> It is undisputed that existing racial imbalance in pupil assignments in this school system is caused solely be the impact of housing patterns in the City of Memphis. (p. 9)

Nothing could be further from the truth. The proof below demonstrated abundantly, to the satisfaction of the District Court and the Court of Appeals, that school segregation in Memphis today is the result of a continuous course of conduct and discrimination by the Memphis school authorities in every area of their responsibility: school construction, pupil and faculty assignment, transportation, etc. Throughout the litigation, however, Petitioners have consistently shadow-boxed a legal theory never propounded by the plaintiffs or the District Court and irrelevant to this lawsuit—that school desegregation is required in Memphis only because there is housing segregation for which the entire or major share of blame is the School Board's.

Swann explicitly eschewed any such theory and we did not urge it below, nor do we in this Court. The District Court did not purport to base either its December 10, 1971 or April 20, 1972 opinions upon such a standard. The issue described by that Court's September 28, 1971 *Order Pertaining to Hearing* was as follows:

> 2. Are the one race schools, or virtual one race schools, genuinely non-discriminatory; that is, are they not the

> result of present or past discriminatory action on the part of the defendants or their predecessors?

It was the School Board's defensive claim on this issue, *viz.*, that its schools are segregated only because of racially separate housing patterns, which brought the subject of residential segregation into this lawsuit. It was the Board's defensive claim that it contributed in no way to either existing school segregation or existing housing segregation in Memphis which led plaintiffs to demonstrate the effect of school system practices upon housing segregation—although we took the position below that in Memphis, the result of that particular inquiry is irrelevant since, whatever the degree to which actions of the school board may have contributed to housing segregation, it is very clear on this record that Memphis school assignments were long made on the basis of race, and the case is therefore governed by the remedial principles of *Swann*.

The Petition claims that since the testimony showed similarities between racial residential segregation patterns in Memphis and other cities,

> [t]he case at bar is thus distinguishable from the *Swann* case, where it was found that previous decisions relating to the location of schools had presented the Court with a "loaded game board." (p. 10)

But the long-standing maintenance of segregated schools in all of Tennessee, including Memphis, mandated by state constitutional and statutory prohibitions (*see Kelley* v. *Metropolitan County Bd. of Educ.*, 463 F.2d 732 (6th Cir. 1972), as well as Petitioners' continuing discriminatory school site location and construction practices (*see infra*) clearly distinguish this case from one in which virtually unaltered, neutral, non-racial single geographic attendance

zones have always been used for student assignment. *Compare Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 846 (1967) *with United States* v. *Board of Educ.*, 429 F.2d 1253 (10th Cir. 1970).[4]

The findings in the December 10, 1971 District Court opinion that the school system had contributed to, aggravated and accommodated racially segregated housing patterns in Memphis are supported by substantial evidence and are not clearly erroneous. *Davis* v. *School Dist. of Pontiac*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971). Since Petitioners completely ignore the evidence in the case, we shall describe some of it at length to illustrate the strong support in the record for the District Court's holdings.

Petitioners did not challenge the district court's findings that the segregated *housing patterns* in Memphis are the direct product of racial discrimination. Indeed, no other findings would have been possible on the record developed below (I Tr. 815-20, 836-41, 843-65, 866-69, 872-74, 889-93, 896-98, 906-12, 923, 924-25, 939-40, 943, 958-66, 1018-21, 1100-05, 1109-21, 1244-51, 1257, 1531-32, 1535-36, 1566-92, 1619-20;

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[4] In *Swann*, 402 U.S. at 23, this Court said:

> We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without *any* discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. (emphasis added)

Although there was considerable evidence of housing segregation resulting from discrimination accepted by the lower courts, *see Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 300 F. Supp. 1358, 1365-66, 1369 (W.D.N.C. 1969), 431 F.2d 138, 141 (4th Cir. 1970), this Court did not rely upon this evidence because it found relief required by the failure to dismantle the dual school system, and it reserved the question. Petitioners' approach to the issue would turn the reserved question on its head by excusing even gross discrimination unless the entire responsibility for all housing segregation is shown to be the school authorities'.

4/1/70 Tr. 1010-13, 1117-20; I XX 30A, 30B, 30C, 31A-F, 33A-C, 35, 36, 68, 69, 69A, 70, 71, 72, 73, 74, 76, 77, 78, 82).[5] The District Court also found that the Board "accommodated the white housing discrimination" by its construction,[6] zoning, busing and pupil assignment policies.

The construction policies followed by the Board in annexed areas are typical. Prior to the annexations, the Shelby County Board of Education provided transportation by bus to all pupils in each area living more than 1½ miles from their assigned schools (I Tr. 801-02). Rather than continue the busing, however, Petitioners elected, notwithstanding the enormous cost involved and their post-*Brown* affirmative obligation to desegregate, to construct new schools and additions to existing schools. Between 1957 and 1970, the Board expended $38 million for mostly segregated schools in annexed areas. Since 1954 the system has constructed 76 new facilities, of which only four opened with racial minorities of more than 10%: Airways Jr. (10.1% black), Chickasaw Jr. 85.5% black), Fairley High (16.7% black), Northside High (79.9% black). (See I Tr. 998-99). Plaintiffs' educational expert concluded that the pattern of school construction since 1954

[5] Citations are to the original record on appeal, which was considered without a printed Appendix. Transcripts of the various hearings in this cause are referenced in the following manner: "I Tr. ——" refers to the transcript of the hearing commencing on November 15, 1971; "II Tr. ——" refers to the March 28, 1972 hearing; transcripts of all other hearings and conferences will be referenced by the date on which the hearing or conference began—*e.g.*, "4/1/70 Tr. ——." (The transcript of each separate hearing or conference is paginated consecutively rather than by volume). Exhibits will be designated in a similar manner, indicated by "X"—*e.g.*, "I X 99," "4/1/70 X 99."

[6] The Superintendent admitted that the location of schools as of 1954 had made desegregation more difficult (I Tr. 692-93). And the Board's post-*Brown* construction practices have followed the pre-*Brown* pattern (2/6/69 Tr. 36-27) (See text *infra*).

has had the clear effect of perpetuating school segregation (I Tr. 1317-26, 1300-02; I XX 86A, 86B, 86C [school construction overlays]; I XX 52A, 52B, 52C, 52D [racial census maps for 1950, 1960, 1967 and 1970]). I X 37A contains the Board's 1959-60-61 Building Program which is broken down into a "White" program (total cost: $8,531,219) and a "Negro" program (total cost: $5,773,532).

Related to the segregation-oriented construction program just described were the Board's attendance zoning practices. Prior to initiation of this lawsuit, the Board had maintained the state-mandated dual system of pupil assignment by means of separate, overlapping attendance zones for the black and white schools. Under a stairstep plan the Board finally eliminated the dual high school zones effective with the commencement of the 1966-67 school year (I X 1049-62, 1286-87). As was demonstrated to the District Court with the use of zone line overlays and maps reflecting the racial distribution of the Memphis population according to the 1950, 1960, 1967 and 1970 U.S. Census compilations, the dual overlapping attendance zone system, coupled with school construction practices, played a significant role in determining housing choices (I Tr. 1021-37, 1326-38, 1381-85, 1451-57, 1465-70; I XX 47B, 48C, 83, 83A, 84, 84A).

Of even greater significance to the continued existence of the dual system were the new zone lines drawn by Petitioners upon elimination of dual zones. Under the dual zone operation the zones were quite large; often black attendance areas were so large as to encompass within their boundaries six or more white attendance areas of the same grade level, and the same was true of white zones in relation to black attendance areas (I Tr. 1021-37). The dual zones were eliminated by creating single zones for each school in the system, and it was in this process that Petitioners carried the dual system forward into the pur-

ported unitary system: the single zone lines, almost without exception, were drawn by contracting the former black and white zones to conform almost precisely with residential segregation lines, thereby continuing to exclude whites from the black schools and blacks from the white schools (I Tr. 1390-1402, 1410-11, 1458-63, 1471-76, 1049-62; I X 49B, 50B, 51B). Petitioners conceded that they have not drawn zone lines to maximize desegregation (I Tr. 214-15, 739); the 1966 Desegregation Plan (I X 38C) under which most zones were drawn made no mention of doing so.

Over the years the Board worked closely with the Memphis Housing Authority (I Tr. 927-29), which operated public housing projects under an overt policy of segregation until 1965, with only ineffective policy modifications since then (I. Tr. 909-12). One example should suffice. Hurt Village was one of the white-only projects built and operated by MHA. The white school (Pope) which served Hurt Village, however, was not as close and convenient as a nearby black school (Grant). In 1960 the Board, in order to accommodate the whites in Hurt Village, reversed the racial designations of the two schools (and exchanged their names as well), so that overnight the formerly white-only school took on the name and function of the formerly black-only school and *vice versa* (I. Tr. 271-78, 906-09, 1401-02).

Every witness in this case who was questioned on the subject conceded that the racial composition of schools and school locations and attendance policies *do* have an effect on individual housing choices (I. Tr. 442, 952-54, 1101-02, 1105-09, 1498-1501, 1529-31, 1612-13; 4/1/70 Tr. 156, 158, 848-60, 868-69, 873, 877).

Thus, the District Court correctly concluded that Petitioners had failed to carry their burden of showing that they were in no way entangled in racially segregated housing patterns and practices in Memphis. But even a con-

trary determination would have controlled only a threshold issue, leaving for further determination the question whether Petitioners' incorporation of Memphis housing segregation through school zoning was in any sense neutral, fortuitous and innocent.[7] Since that is emphatically not the case, the District Court was right in requiring the design of desegregation plans affecting every Memphis school.

II

The Desegregation Order of the District Court Will Neither Inordinately Burden the School District Nor Interfere With the Educational Process.

Petitioners argue that the District Court's judgment exceeds the *Swann* guidelines of practicality and feasibility and that, in any event, "busing" is educationally unsound and should be rejected as a desegregation tool.

The latter contention invites the Court to reconsider its decision in *Swann* without setting forth any reason for so doing except a recent (and controversial) popular journal article which purportedly establishes the educational harm of pupil transportation.[8] Furthermore, just as this Court

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[7] Petitioners apparently agree with the District Court that "[t]he proof unquestionably establishes that the one-race schools do follow racial housing patterns" (Petition, p. 9). Thus, Petitioners concede that they have, by their construction, attendance and zoning policies and practices, incorporated the racial discrimination in housing into the school system. *See Brewer* v. *School Bd. of Norfolk*, 397 F.2d 37 (4th Cir. 1968) (cited with approval in *Swann*, 402 U.S. at 21); *Davis* v. *School Dist. of Pontiac, supra; Sloan* v. *Tenth School Dist. of Wilson County*, 433 F.2d 587, 589 (6th Cir. 1970) (citing *Brewer*); *United States* v. *Board of Educ., supra.*

[8] The relevance of that study to Memphis is in doubt, as its author suggested. See Ptn. Appendix, p. 37e, f.n. 1; *id.* at p. 8e.

recognized in *Swann* that transportation was an accepted educational tool, so Petitioners are hard pressed to maintain their position: although Memphis never operated a system-wide transportation network, the record demonstrates that a considerable amount of busing for segregation took place in Memphis—particularly in connection with annexations.[9]

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[9] Some examples:

In a 1950 annexation, Memphis expanded to the east and southeast, taking in the following schools operated by the County Board (under the dual system): Douglas (black), St. Stephens (black), White Station (white), Patterson (black), South Park (white), Maple (white), Gragg (white), Grahamwood (white), Cane Creek (now Dunn) (black). (I Tr. 769-76; I XX 10 (map), 13). Sherwood (white) and another school (probably Charjean, see I X 13 at 2), although not operated by the County Board were built by them pursuant to a joint agreement with Petitioners (I Tr. 777). The black schools in this annexed area were elementary schools; black secondary students in the area were bused, depending on where they lived, to black high schools which remained in the county: Neshoba (grades 1-10) at Germantown in the eastern part of the county, and Geeter (grades 1-12) in the south. Those black students who went to Neshoba through grade 10 were assigned to Woodstock, in the northern portion of the county, for grades 11 and 12. For these students no bus transportation was provided; they travelled to Woodstock on Sunday afternoon and lived in a dormitory until Friday night. (I Tr. 772-73). (Prior to 1947 or 1948, no transportation at all was provided for black students, I Tr. 773-74). The white students in this area also received bus transportation (I Tr. 775-76).

A 1958 annexation brought the Frayser area into the city, thereby expanding Memphis considerably to the north and adding 6,011 students to the system. There were no black schools in this area; black students had been bused to Woodstock (north of the Frayser area) (I Tr. 779, 781). Several schools were built in the Frayser area under a joint building program with Petitioners (I Tr. 779-81) while the white students in the area were bused to white schools (I Tr. 781-82). After the annexation, Petitioners contracted with the County Board to continue busing black students in the Frayser area to the County "black" school, Woodstock (Dec. 10 Op. at 11; I Tr. 1348-49, 1645).

Whatever may be the responsibility of school authorities generally for the acts of other public agencies, *see Deal* v. *Cincinnati Bd. of Educ., supra*, the Memphis educational authorities are clearly linked to the segregatory busing practices of the Shelby County system not only because they are the immediate successor to the County Board but also by their affirmative participation in the continuation of such programs after annexation. Thus Petitioners are hardly in a position to maintain that they have never "bused for segregation" or that many of their students are not now attending segregated schools as the result of past segregatory busing.

Even were this not the case, Memphis would gain no immunity from being required to use "any of the tools of modern life in carrying out [the] constitutional mandate," *Kelley, supra*, including busing. While the costs of implementing desegregation may be substanial (although not in comparison to the Board's expenditures for segregated construction), those expenditures must be made. *Brewer* v. *School Bd. of Norfolk*, 456 F.2d 943 (4th Cir.), *cert. de-*

In 1965 Memphis expanded to the southeast, annexing the Oakhaven-Parkway Village area and 6,051 public school students. All the schools in this area were white, except Getwell; all students were provided transportation with the black high school students being bused to Capleville School (still in the county) and whites to Oakhaven (I Tr. 784-87).

In these and other annexed areas the Petitioners and the Shelby County Board have historically cooperated in such joint ventures as building programs and educational services (one system providing education for pupils residing in the other system's jurisdiction). (See 2/6/69 Tr. 401). Although the Memphis Board has consistently chosen to construct new schools and additions rather than continue transportation (I Tr. 305-09), and although it has begun construction programs in the annexed areas even before the effective date of the annexations (I Tr. 309-10, 436, 452-53), the Board has had to provide temporary transportation services to maintain segregation pending completion of new schools after every annexation (I Tr. 763, 433, 435, 436, 736-38).

nied, 406 U.S. 905 (1972); *United States* v. *Greenwood Municipal Separate School Dist.*, 460 F.2d 1205 (5th Cir. 1972).

The logistical feasibility of pupil transportation in Memphis is illustrated by the fact that existing Memphis Transit Authority routes serve, within two blocks, every elementary school in the Memphis system (II Tr. 760-62). And the times and distances between schools, based on existing MTA runs, are quite reasonable (4/1/70 Tr. 1125 et seq.). In the words of the Board's attorney: "The service is there to transfer from any school in any part of the city to any other part of the city and get there within a reasonable length of time" (4/1/70 Tr. 1223-24).

Petitioners venture (p. 12) that implementation of Plan A "will impinge disastrously on both the finances and the curriculum of the school system," but that contention is thoroughly refuted by the record.

While the implementation of Plan A may cost from $565,000 to $700,000, it also provides counterbalancing savings: the plan permits the closing of seven elementary schools, allowing Petitioners to better utilize their facilities (as well as eliminate some overcrowding problems),[10] thereby resulting in considerable savings (II Tr. 165, 167, 172, 728-29; April 20 Op. at 16, 17; May 5 Order Denying Stay at 5); the plan eliminates the need for the construction of at least three planned new schools, resulting in a savings approaching $3,000,000—proposed new elementary school near the present Oakville school (estimated savings, $1,000,000), proposed new elementary school in Glenview

[10] I X 18 reveals 19 schools with enrollment larger than the rated maximum capacity. In the system as a whole, however, there are 33,875 net vacant pupil spaces based on rated maximum capacity, of which 41% are in 90%+ black schools and 36.5% are in 90%+ white schools (I X 57).

Park (estimated savings, $800,000), and proposed replacement of Merrill (estimated savings, probably $500,000-$800,000) (II Tr. 172-75, 265-68). The long-range economics of Plan A may be equally favorable, providing Petitioners with the means to better utilize their under-capacity facilities and to generally operate a more economically efficient school system.

The real issue was stated by the district judge during the 1971 hearing: "what are the constitutional rights of over a hundred thousand children worth?" (I Tr. 643). Surely the answer, if there is one, is greater than $700,000 in a system with an annual budget of over $98 million. *Cf. Brewer* v. *School Bd. of Norfolk, supra,* 456 F.2d at 947 n. 6; *see also, United States* v. *Greenwood, supra; Brown* v. *Board of Educ.,* 464 F.2d 382 (5th Cir.), *cert. denied,* 41 U.S.L.W. 3253 (1972).

Petitioners' remaining arguments contend that no effective desegregation should ever be ordered in Memphis because student participation in extracurricular activities or their availability for after-school employment, etc., may be affected. These considerations are characterized as features of desegregation which "impinge upon the educational process." *Swann* recognizes that the process of desegregation will result in some awkwardness and inconvenience (402 U.S. at 28) but limits those circumstances which will excuse failure to desegregate to plans under which "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." 402 U.S. at 30-31. Petitioners made no such argument but opposed any and all pupil transportation. Furthermore, not only are the transportation times proposed under Plan A well within the parameters considered reasonable in *Swann,* but many pupils will get to their new schools *with* busing under the plans faster than others who

must now either walk or furnish their own transportation! Finally, it is well within Petitioners' power to avoid some of these practical problems as, for example, by scheduling extra "late" bus runs for students participating in extracurricular activities.[11]

III

The Court of Appeals Properly Instructed the District Court to Complete the Process of Dismantling Memphis' Dual School System.

Petitioners' attempt to suggest that the Court of Appeals required further pupil busing in a school system which the District Court held would be made completely unitary under Plan A, is nothing short of duplicitous. The Petition proceeds (pp. 16-17) as though plaintiffs had not cross-appealed the adequacy of the District Court's Order, and as though the Court of Appeals acted *sua sponte*.

The language of the Court below speaks for itself (Ptn. Appendix, pp. 3c, 9c):

> In *their* appeal from the District Court's order the plaintiffs complain that the new plan adopted by the District Court does not meet the requirement of *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 439 (1968), that any desegregation plan adopted be one which "promises realistically to work, *now*." (emphasis in the original).
>
> . . .
>
> Plaintiffs too have objected to the District Court's overall decision, however. They assert that the Dis-

[11] Many districts with substantial numbers of transported pupils have rescheduled extracurricular activities in the middle of the day (II Tr. 1114-16).

trict Court erred in rejecting plans which could have provided for more desegregation faster. Plaintiffs point out that the present plan will still leave 80 of Defendant's 162 schools in the one-race status at the close of the '72-'73 school year. They contest the accuracy of the District Court's finding that the more effective plans submitted to it would prove impractical. At the same time Plaintiffs raise these objections, however, they acknowledge that at this late date no more effective desegregation plan could be implemented for the beginning of the 1972-73 school year. Since they also recognize that the District Judge accepted the need for further desegregation in the future they request only that this Court direct the District Court to prepare a timetable for further desegregation. We believe such request is reasonable. It will allow the implementation of the present plan unimpeded by procedural wrangles, while providing an opportunity for the District Court to arrive at a final plan which is effective, "feasible and pedagogically sound." *See Robinson* v. *Shelby County Board of Education*, 442 F.2d 255, 258 (6th Cir. 1971) (Opinion of McCree, Judge.)

References in the opinion of the District Court suggest its view that Plan A will not create a unitary school system in Memphis. Thus, for example, the court follows its statement (Ptn. Appendix, pp. 23b-24b) that it believes "the approved plan meets the requirements of the Constitution" with its expressed hope that it "*will afford* the defendants a means of *ultimately achieving* the goal of *a desegregated school system*. . . ." (emphasis supplied). The court concludes (*ibid.*):

> Upon consideration of all the plans, the proof offered at the hearing and the entire record in the cause, this

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> Court is of the opinion that Plan A, with certain modifications, meets the criteria established and required by the Constitution of the United States as interpreted by the authorities. The practicalities of the existing situation in the City of Memphis limit the change in the plan of desegregation to this extent at the present time. Plan A will afford the defendant Board an opportunity to implement a system of transportation for its students, and thereby afford the defendants with an opportunity to observe the best ways and means for implementing further desegregation in the future. Plan A further meets the test of practicalities with regard to time of implementation and costs in the light of the circumstances existing at this time.

A cursory study of the results which are anticipated under Plan A reveals its total inadequacy. Appendix B to this Brief shows past, present and projected student enrollment in Memphis schools which were completely segregated one-race schools in 1969-70.[12] The table demonstrates that as to these schools, which even the Memphis Board concedes were segregated schools in 1969-70, there had been very little actual desegregation by 1971-72. Each of these 56 schools remained either all one-race or virtually all one-race schools in 1971-72.[13] Plan A was to have no effect whatsoever on the racial composition of 34 of these schools. At two additional schools which serve more than one grade level, only one such level would be

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[12] *See* Petition for Writ of Certiorari, *Northcross* v. *Board of Educ.*, 397 U.S. 232 (1970) [No. 1136, O.T. 1969], pp. 24a-31a.

[13] The token desegregation which did occur in some schools is largely accounted for by the faculty desegregation process and the privilege afforded teachers to enroll their children in the schools in which they taught.

affected. Even the remaining schools, at which Plan A would result in a different student population in 1973-74, can by no means be said to all be effectively desegregated.[14]

The exhibits demonstrated that under Plan A, 80 schools would have student bodies more than 90% of one race or another, and that 68,699 (or 47.4%) of Memphis students would remain in such schools.

We think it is clear that the District Court's action approving such a plan could only be sustained, if at all, as an interim measure adopted because of overbearing practical considerations, and that the Court of Appeals was unquestionably correct and justified in requiring completion of desegregation in Memphis *forthwith*.

[14] Of the 34 one-race schools which would be completely unaffected by Plan A, 23 were virtually all-black schools in 1971-72 and enrolled 24,388 black students, or 32.6% of the black pupils in the system (other than kindergarten and special education students, whose assignments will not be affected by Plan A). An additional 1112 black students were in grade levels of the two schools which were virtually all-black in 1971-72, only some of whose grade levels would be reached by Plan A. Thus 25,500 (34.1%) of the black students attended virtually all-black schools or grade levels in 1969-70 ar d 1971-72 which would not be affected at all by Plan A. Eleven of the unaffected schools were all-white in 1969-70 and virtually all-white in 1971-72. These 11 schools in 1971-72 enrolled 10,949 white students, or 16.9% of all whites in the system (exclusive of kindergarten and special education pupils).

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CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents respectfully pray that the Writ be denied, and that pursuant to §718 of the Education Amendments of 1972, the District Court be instructed to award counsel for Respondents a reasonable attorneys' fee for services in connection with the proceedings before this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

Recent History of *Northcross* v. *Board of Educ. of the Memphis City Schools*

On remand from this Court's decision in *Northcross* v. *Board of Educ. of Memphis,* 397 U.S. 232 (1970), the district court entered an order setting a hearing on April 1, 1970 to consider seven issues: (1) whether the defendant Board was then operating a unitary system; (2) whether the court should require defendants to adopt a new or modified plan utilizing any one or more, or a combination of such methods as rezoning, pairing, contiguous zones or cross-transportation of pupils between zones, and if so, to what extent; (3) whether the court should eliminate the free transfer policy; (4) whether the court should require a faculty desegregation ratio which, within a margin of 10%, would reflect the system-wide racial ratio of the faculty; (5) whether the court should enjoin further construction by the defendants pending adoption of a new plan; (6) whether a new plan should be requested from an expert from outside the system; and (7) when should any relief granted by the Court be placed into effect.

The hearing commenced on April 1, 1970 and lasted seven and one-half trial days. On May 1, 1970 the district court entered its opinion (312 F. Supp. 1150), and on May 4, 1970 its implementing order. The court held that the defendants were "not maintaining a unitary system," largely because of the free transfer policy and continued faculty segregation, but the court rejected pairing and transportation as desegregation techniques for Memphis. The court altered the free transfer policy so that majority-to-minority transfers would, with two limited exceptions, be prohibited; majority-to-majority and minority-to-minority transfers

would continue to be allowed. In the area of faculty desegregation, the district court held, in effect, that defendants had not complied in good faith with the court's May, 1969 faculty desegregation order, and the court therefore ordered the defendants to seek the assistance of the Title IV Educational Opportunities Planning Center at the University of Tennessee in preparing for further faculty desegregation. The Title IV Center subsequently filed a faculty desegregation plan, the Board filed a counterproposal, and the court conducted a hearing thereon. On July 21, 1970, the district court entered an order essentially approving the Title IV Center faculty plan and requiring that by the beginning of the 1971-72 school year the white-black ratio of each school's faculty should be within 10% of the system-wide white-black faculty ratio.[1]

Plaintiffs appealed from the orders of the district court,[2] and oral argument was held in the court of appeals on February 11, 1971. After oral argument, but before decision of the appeal, defendants filed in the district court a notice of intent to acquire sites and construct two new schools in the southwestern part of the system, to which plaintiffs filed objections. The district court conducted, on February 19, 1971, a hearing on plaintiffs' objections to the proposed site acquisition and construction, and orally

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[1] The district court thus allowed defendants two school years within which to complete faculty desegregation requirements, although the Title IV Center had noted that Administrative policy and the law (*Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F.2d 1211 (5th Cir. 1969), required immediate completion of the faculty desegregation process.

[2] Defendants noticed an appeal from the faculty desegregation order of July 21, 1970, but the appeal was never perfected (although the court of appeals apparently considered the Board's cross-appeal to be viable at the time of the June 7, 1971 remand opinion, 444 F.2d 1179).

overruled plaintiffs' objections at the conclusion of the hearing. This ruling was incorporated in a formal order and plaintiffs' application for an injunction pending appeal was denied by order of the same date.

Plaintiffs then moved in the court of appeals for an injunction restraining the proposed site acquisition pending appeal. On March 24, 1971, the court of appeals, without the benefit of oral arguments or briefs, entered a *per curiam* opinion denying the motion for injunction pending appeal and affirming on the merits the district court's approval of the site acquisition and construction proposals. Plaintiffs thereupon filed an application for rehearing *en banc* on April 5, 1971.

On June 7, 1971, the court of appeals remanded the case to the district court for reconsideration in light of this Court's April 20, 1971 decisions in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Comm'rs.*, 402 U.S. 33 (1971), and for adoption of a new plan of desegregation. 444 F.2d 1179. By opinion of the same date the court of appeals denied plaintiffs' petition for rehearing *en banc* on the site acquisition-construction issue. 444 F.2d 1184.

On remand, the district judge, by letter dated June 10, 1971, informed counsel that he had school-age sons, one of whom was and would be in attendance in the defendant school system, and:

> If counsel for the plaintiffs or defendants or their clients are of the opinion that I should recuse myself from the case due to the fact that I have school age sons, a notice to that affect should be delivered to Lloyd Johnson, the Clerk of this Court. If the Clerk receives such a notification he, in turn, will advise me

that he has received it without disclosing which attorney delivered the notice. *I will then request the designation of another judge.* (emphasis added).

On June 11, 1971, before plaintiffs had made a final decision regarding the district judge's June 10 letter, the court held a pretrial conference at which it was agreed that, regardless of the parties' responses to the letter, the court could enter a preliminary order requiring the Board to take certain steps such as the preparation of a pupil locator map and a request for assistance from outside experts in the preparation of a constitutional plan of school operation. (6/11/71 Transcript of Pretrial Conference at pp. 52, 60). (No such order was ever entered, however.)

June 16, 1971, plaintiffs filed with the district court clerk a request for designation of a new judge to preside over the case pursuant to the district court's June 10 letter. On June 24, 1971 the district court entered an order forwarding plaintiffs' request to the chief judge of the court of appeals, with the provision that "no further proceedings will be conducted until this motion is resolved." On July 12, 1971 the Chief Judge entered an order denying the request for designation of a new judge and ordered the case tried "by the district judge to whom it is assigned," Hon. Robert M. McRae, Jr.

On July 27, 1971, the district court entered an "Order Pertaining to Assistance" authorizing the Division of Equal Educational Opportunities, U.S. Office of Education, Department of Health, Education and Welfare, to assign qualified personnel to assist defendant Board in carrying out the court of appeals' mandate of June 7, 1971. The order also directed defendants to implement a

majority-to-minority transfer plan with free transportation prior to commencement of the 1971-72 school year, but held that no further desegregation would be required by the opening of school.

On July 28, 1971, the district court denied a motion by plaintiffs for leave to employ an expert at defendants' expense for the purpose of preparing a desegregation plan for plaintiffs.

On August 11, 1971, the district court held a conference with counsel, Board personnel and the HEW-designated team, at which it was determined that the team would make a preliminary investigation of the system pursuant to the July 27 order and that the Board would begin preparation of a pupil locator map. On September 9, 1971, the district court held another conference to determine the progress of the Board and the team. The team reported that it had made a preliminary investigation but that there were several questions to which it sought answers before proceeding further. (9/9/71 Tr. 8-11). Of the seven questions proposed by the team, the court considered one of the questions—whether the team should consider the racial composition of any school as "*de facto*," which should therefore be left alone—of such consequence as to require a hearing. (9/9/71 Tr. 37-39, 44). Plaintiffs took the position that there were no real issues and that the team should be required to prepare a plan which would produce the greatest possible amount of actual desegregation, taking into account the practicalities of the situation. (9/9/71 Tr. 52). Over the objection of plaintiffs, both as to timing and the necessity for a hearing, the district court scheduled the hearing for November 15, 1971. (9/9/71 Tr. 43-44, 46). On September 14, 1971, the district court entered an order setting a hearing for November 15, 1971 "for the purposes

of determining certain factual and legal issues and providing guidance to the Board and the team."

On or about September 22, 1971, plaintiffs filed in the court of appeals a petition for a writ of mandamus or for alternative relief seeking to have the district court promptly schedule the hearing set for November 15, 1971. The court of appeals entered an order on October 26, 1971 denying the petition for a writ of mandamus or for alternative relief. (No. 71-1794, Order of October 26, 1971).

In the meantime, on September 28, 1971, the district court entered an order setting forth the issues to be determined at the hearing scheduled for November 15, 1971, and directing defendants to file "any proposed desegregation plan changes which the Board intends to recommend in view of the Court of Appeals opinion remanding this case to the Court for consideration in the light of *Swann* and *Davis*." Pursuant thereto defendants subsequently filed a document entitled "The Memphis Plan."

A pre-trial conference was conducted on November 5, 1971 and on November 8, 1971 the district court entered a pre-trial order enjoining defendants from entering into any land purchases or construction contracts with regard to notices of intent previously filed and further clarifying the matters to be considered and the procedure to be followed at the November 15 hearing. The order also defined a "virtual one-race" school as one in which the predominate race is 90% or more, which definition was to be a guideline.

Prior to the November 15 hearing a white community organization, Vollentine Evergreen Community Action Association, Inc., and certain of its members, petitioned the court for leave to intervene as *amicus curiae* and to participate in oral arguments, alleging that the petitioning organization was organized for the purpose of promoting and

maintaining a stable racially integrated residential neighborhood in an area of Memphis included in the Northside High School zone. Petitioners further alleged that they were being forced to bear an unfair and disproportionate share of the desegregation burden as a result of defendant Board's segregation policies, and requested a truly integrated high school at Northside. The petition to intervene *amicus curiae* was allowed by order entered November 15, 1971.

The November 15 hearing lasted eight trial days and the court heard closing arguments of counsel on November 26, 1971. On December 10, 1971 the district court filed its Memorandum Decision and a separate Judgment concluding that the Board had not carried its burden of proving that existing school segregation was not related to the historic operation of the system:

> In regard to the over-all issue of one-race schools, this Court concludes that the proof establishes that the defendant Board and its predecessors have played a significant role in establishment of the present large number of one-race schools which have resulted from discrimination by numerous persons and groups. Therefore, it is incumbent upon the Court to require the Board to request that the team of the Division make recommendation to the defendant Board for ways that it should amend its present plan of desegregation to the end that the Memphis schools will be in compliance with the Constitution of the United States.

(December 10 Memorandum Decision at 12). The court then set forth criteria to be utilized in the preparation of two alternative plans by the HEW-designated team. (December 10 Memorandum Decision at 16-17).

Defendants thereafter filed a motion to alter or amend the Memorandum Decision of December 10, 1971, which motion was denied by order entered on December 21, 1971.

The district court's December 10 judgment directed that "pursuant to a prior request made by the defendant Board of Education, the personnel designated by the Division of Equal Educational Opportunities of the United States Office of Education will immediately undertake to further investigate and make recommendations to the defendant Board in accordance with the Memorandum Decision of the Court." On January 6, 1972, however, the Associate Commissioner of Equal Educational Opportunity of the United States Office of Education wrote the head of the HEW-designated team placing restrictions on the activities of the team pursuant to the district court's judgment.

The district court entered an order on January 12, 1972, concluding that the "belated and unexpected change in policy and procedure [by HEW] causes the Court to conclude that neither it nor the Board can rely upon the proffered assistance of the Department of Health, Education and Welfare in carrying out the mandate of the Court of Appeals." The court therefore relieved the HEW team from further participation in the case and directed the defendant Board to comply with the judgment of December 10 and prepare the two plans directed by the court's December 10 Decision. Plaintiffs thereafter moved to amend the order of January 12, 1972 to require the Board or have the court employ outside consultants experienced in desegregation planning to prepare the two plans, and further to establish a strict timetable for the preparation thereof. The district court held a conference on plaintiff's motion on January 25, 1972 and entered an order on January 28, 1972 denying the essential elements of plaintiffs' motion. The

defendant Board then designated a team of its staff to prepare the two plans directed by the December 10 judgment; several conferences were subsequently held pertaining to the progress of preparation.[3]

On March 21, 1972 defendant Board filed a motion to delay the scheduled March 28 hearing, which motion was based on a message to Congress delivered by the President of the United States on March 17, 1972 opposing the use of transportation for the purposes of school desegregation. By order entered the same date, the district court denied defendants' motion to postpone the March 28 hearing, which began as scheduled and lasted seven trial days. On April 20, 1972, the district court issued its Memorandum Decision adopting Plan A, which had been prepared by defendant Board's staff (but to which defendant Board had objected), and directing that said plan be implemented by the beginning of the 1972-73 school year.

> Upon consideration of all the plans, the proof offered at the hearing and the entire record in the cause, this Court is of the opinion that Plan A, with certain modifications, meets the criteria established and required by the Constitution of the United States as interpreted by the authorities. The practicalities of the existing situation in the City of Memphis limit the change in the plan of desegregation to this extent at the present

[3] On March 1, 1972 plaintiffs filed a motion for a temporary restraining order or preliminary injunction to restrain defendants from enrolling any more students (resulting from a new public housing project) in the already overcrowded black Geeter school. The motion was resolved by consent decree entered on March 13, 1972 wherein defendants agreed to assign all new incoming students in the Geeter zone in grades 1-9 to the nearest school of the opposite predominate race, providing transportation where necessary.

> time. Plan A will afford the defendant Board an opportunity to implement a system of transportation for its students, and thereby afford the defendants with an opportunity to observe the best ways and means for implementing further desegregation in the future. Plan A further meets the test of practicalities with regard to time of implementation and cost in the light of the circumstances existing at this time.

(April 20, 1972 Memorandum Decision at 23). The district court entered its order on April 21, 1972.

On May 1, 1972 defendant Board filed a notice of appeal and simultaneously filed a motion to stay the district court's order.[4] Subsequently the Board, by letter, requested certain modifications of the April 21 order primarily having to do with pupil transfers. On May 5, 1972, the district court entered an order supplementing its April 20 Memorandum Decision and the order of April 21, 1972 in accordance with certain agreements reached at a post-hearing conference. On the same day, the district court entered an order denying defendant's motion for a stay pending appeal, and defendants subsequently applied to the court of appeals for a stay.

On May 22, 1972, before the court of appeals had acted on the stay application, defendant Board voted to delay entering into a pupil transportation contract for implementation of the court-ordered Plan A. Believing that the Board's action was designed to and would have the effect of frustrating compliance with the district court's order, and supported by the affidavit of one Board member, plaintiffs,

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[4] Plaintiffs noticed a cross-appeal on May 16, 1972 from the district court's failure to require completion of the desegregation process.

on May 23, 1972, moved in the district court for a judgment of contempt against defendants. The district court conducted an evidentiary hearing the same day. Defendants took the position that although their delay action might have ruled out any possibility of entering into a contract with the low bidder (a private transportation company in Kansas City, Missouri), they could contract for implementation of Plan A with the Memphis Transit Authority (the local public carrier) as late as the month of July. (5/20/72 Tr. 23-24). The district court denied the contempt motion, finding that respondents' "action did not mean that the plan could not be implemented by the coming year." (District Court's Oral Ruling, 5/22/72 Tr. 125). The court's oral ruling was formalized in an order entered June 23, 1972.

On June 2, 1972, the court of appeals stayed the district court's order pending appeal. (Misc. No. 1576). On June 6, 1972 plaintiffs filed in the court of appeals a suggestion for hearing the appeals in this case *en banc* and motion to vacate the stay order of June 2, which was denied July 5, 1972, 463 F.2d 329. The appeal was expedited for argument on July 15, 1972, and on August 29, 1972, the Court of Appeals rendered its opinion affirming the district court's desegregation order, directing completion of desegregation "in the minimum time required" and vacating the previous stay.

Appendix B

(See Opposite) ☞

P

FOR MEM

School		Kinde White	Sr. High White	Black
y				
	1969-70	---	---	---
	1971-72	---	---	---
	Plan A	---	---	---
clair				
	1969-70	25	---	---
	1971-72	25	---	---
	Plan A	No	---	---
ookmeade				
	1969-70	---	---	---
	1971-72	---	---	---
	Plan A	---	---	---
dwell				
	1969-70	---	---	---
	1971-72	0	---	---
	Plan A	No	---	---

FOLDOUTS TOO LARGE TO BE FILMED